IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 395

UNITED STATES OF AMERICA,

Petitioner,

—v.—

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX TO APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

Civil Action No. 1647

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1964	
Sept. 8	Filing Original Complaints. J. S. 5 card prepared.
Sept. 8	Preparing copy and Issuing Summons for service. Delivered to U.S. Marshal.
Sept. 17	Filing Marshal's Return of Service.
Oct. 2	Filing Defendant's Motion for More Definite Statement.
Oct. 2	Filing Defendant's Motion to Dismiss.
Oct. 2	Filing Defendant's Answer.
Dec. 31	Filing Plaintiff's Request for Admissions with Certificate of Service attached thereto.
1965	
Feb. 4	Filing Plaintiff's Brief in Response to Defendant's Motions to Dismiss and for More Definite Statement with certificate of Service attached thereto.
Sept. 8	Filing Response to Brief filed by Defendant at hearing held July 15, 1965.
Oct. 12	Filing and entering Order granting defendant's Motion to Dismiss Complaint. (Mr. W. Reeves Lewis, Asst. U.S. Attorney, notified by mail of this Order this date) J. S. 6 card prepared.

DATE	FILINGS—PROCEEDINGS
1965	
Nov. 3	Filing Judgment on Decision by the Court dismissing case in accordance with Order of Court filed October 12, 1965. Copy of Judgment served on U.S. Attorney by hand this date.
Dec. 10	Filing Plaintiff's Notice of Appeal with certificate of service thereon.
1966	
Jan. 17	Filing Order of Court enlarging time for docketing record in Court of Appeals to Feb. 18, 1966.
Feb. 10	Filing Plaintiff-Appellant's Designation of Record on Appeal with certificate of service.
No. 23432—In the United States Court of Appeals for the Fifth Circuit	
1969	
Feb. 28	Opinion of the Court of Appeals
Feb. 28	Judgment of the Court of Appeals
No. 395 —In the United States Supreme Court	
1969	
May 27	Order extending time to file petition for a writ of certiorari until July 28, 1969.
July 28	Petition filed.
Aug. 18	Brief in opposition filed.
Oct. 13	Order of Supreme Court granting certiorari.

COMPLAINT

(Filed September 8, 1964)

Plaintiff, The United States of America, complains of M. O. Seckinger, Jr., Trading as M. O. Seckinger Company, defendant herein and alleges:

Count I

1. That the defendant is the owner of a construction company maintaining a business address at 412 Whitaker Street, Savannah, Chatham County, Georgia, within the Southern District of Georgia.

2. That on the 11th day of August 1958, one Ernest E. Branham instituted an action in the United States District Court for the Eastern District of South Carolina, Columbia Division, Civil Action Number AC-183 entitled *Ernest E. Branham* v. *United States.*

3. That said action was instituted pursuant to the Federal Tort Claims Act, 28 U.S.C. Section 1346 (b), to recover damages suffered by said Ernest E. Branham when he was injured on or about November 14, 1956, while working as a steam fitter for the M. O. Seckinger Company in the construction of outside distribution steam supply lines at the Paris Island Marine Depot, South Carolina.

4. That said complaint further alleged that on or about the date of November 14, 1956, while the said Ernest E. Branham was engaged in his work as an employee for the named defendant herein he was caused to come in contact with electric wires of high voltage which caused him to sustain severe injuries for which he sought damages in the amount of $125,000.00.

5. That on the 25th day of January, 1960, the United States of America moved to implead the M. O. Seckinger Company as a third-party defendant in the suit brought by the said Ernest E. Branham against the United States and on July 20, 1960, an order was issued by the United States District Court granting said motion to implead the M. O. Seckinger Company.

6. That on the 17th day of July, 1961, upon motion made by the attorney for M. O. Seckinger Company to dismiss the third-party complaint the United States District Court did dismiss the third-party complaint and issued an order which stated:

> After hearing the arguments of counsel, I am of the opinion that the controversy between The United States of America, Third-Party Plaintiff, and M. O. Seckinger Company, Third-Party Defendant, should not be resolved at this time and further that its inclusion in the trial of the dispute between Ernest E. Branham and the United States of America would unnecessarily and improperly complicate the issues between the Plaintiff and the United States of America. For this reason I, therefore, order that the Third-Party Complaint be dismissed with leave to the Defendant, The United States of America, to take such further action at an appropriate time against M. O. Seckinger Company as it may be advised.

7. That after trial of the civil suit instituted by said Ernest E. Branham judgment was rendered against the United States of America in the amount of $45,000.00 and that thereafter costs were assessed against the United States in the amount of $66.20 and that the United States of America paid to Ernest E. Branham by checks from the Treasury of the United States, dated November 15, 1961, $45,066.20.

8. That at all pertinent times the defendant was an independent contractor engaged pursuant to Contract NOy-91119, dated 28 April 1956, by the United States of America to construct outside distribution steam supply lines at the Paris Island Marine Depot and that under the terms of said contract the defendant, M. O. Seckinger, Jr., Trading as M. O. Seckinger Company, undertook and agreed, among other things, to be "responsible for all damages to persons or property that occurred as a result of his fault or negligence in connection with the prosecution of the work."

9. That all injuries and disabilities sustained by Ernest E. Branham were caused by and must solely be the

responsibility of the defendant herein in that at said time and at said place the defendant, by and through its agents, servants and employees:

(a) Failed to request that the power distribution line be deenergized.

(b) Failed to request that the wires at the place where the accident occurred should be insulated.

(c) Failed to provide safety insulation on the wires.

(d) Permitted and in fact directed Ernest E. Branham to work in an area where live wires were in close proximity to his place of work.

(e) Failed to prevent Ernest E. Branham from proceeding in a manner that was dangerous and which caused him to be injured.

10. That Ernest E. Branham made a recovery as against the United States of America because of the fault or negligence of the defendant, its agents, servants and employees as set forth above and therefore the United States of America is entitled to be fully indemnified as to all such sums from the defendant herein.

Count II

11. The plaintiff incorporates by reference the allegations contained in paragraphs 1 through 9 as fully as though the same were here set forth at length.

12. That having undertaken to perform the contract with the United States of America the defendant, its agents, servants and employees were obligated to perform the work properly and safely and to provide workmanlike service in the performance of said work.

13. That the United States of America became obligated and did pay to said Ernest E. Branham $45,066.20 which was a result of the breach of contract by the defendant, its agents, servants and employees as set forth above and that therefore the United States of America is entitled to recover fully all such sums from the defendant herein.

WHEREFORE, plaintiff demands judgment against defendant as follows:

(a) For the sum of Forty-five thousand sixty-six dollars and twenty cents ($45,066.20) and
(b) For its costs of suit herein incurred;
(c) For interest allowable under the law.

DONALD H. FRASER
United States Attorney

/s/ W. REEVES LEWIS
Assistant U. S. Attorney

Address:

Post Office Box 979
Savannah, Georgia

MOTION TO DISMISS

(Filed October 2, 1964)

NOW COMES the defendant in the above captioned matter and moves the Court to dismiss both counts of this action because the complaint fails to state a claim against defendant on which relief can be granted due to the following reasons:

(a) The contract sued on was not a contract of indemnity so as to make this defendant liable.

(b) The cause of action which plaintiff sues on has already been satisfied by payment of $45,066.00 to Ernest E. Branham.

(c) Any liability for any injury to or damage to Ernest E. Branham was covered by the Workmen's Compensation laws of the State of Georgia and the State of South Carolina, and this defendant is not further liable thereon.

(d) This claim is barred by the Statute of Limitations of the State of Georgia.

(e) This claim is barred because there can be no contribution within this State between joint tort feasors.

(f) This claim is barred because of the failure of the United States Government to successfully interplead this defendant in action Number AC-183 in the District Court of the United States, Eastern District of South Carolina, Columbia Division, and judgment therein is res adjudicata.

(g) The contract sued on did not specifically indemnify United States of America for injury caused by its own negligence.

KENNEDY AND SOGNIER

By /s/ J. G. KENNEDY, JR.
Attorneys for Defendant
717 Realty Building
Savannah, Georgia

ANSWER

(Filed October 2, 1964)

NOW COMES M. O. SECKINGER, JR., T/A M. O. SECKINGER COMPANY, the defendant, in the above captioned matter, and subject to his Motion to Dismiss heretofore filed, and his Motion for More Definite Statement heretofore filed, answers plaintiff's petition, and says:

1. Defendant denies paragraph 1 in Count I of plaintiff's petition.
2. Defendant denies paragraph 2 in Count I of plaintiff's petition.
3. Defendant denies paragraph 3 in Count I of plaintiff's petition.
4. Defendant denies paragraph 4 in Count I of plaintiff's petition.
5. Defendant denies paragraph 5 in Count I of plaintiff's petition.
6. Defendant denies paragraph 6 in Count I of plaintiff's petition.
7. Defendant denies paragraph 7 in Count I of plaintiff's petition.
8. Defendant denies paragraph 8 in Count I of plaintiff's petition.
9. Defendant denies paragraph 9 in Count I and each and every sub-paragraph thereof of plaintiff's petition.
10. Defendant denies paragraph 10 in Count I of plaintiff's petition.
11. Defendant denies paragraph 11 in Count II of plaintiff's petition.
12. Defendant denies paragraph 12 in Count II of plaintiff's petition.
13. Defendant denies paragraph 13 in Count II of plaintiff's petition.

WHEREFORE, defendant prays that claim of plaintiff be denied.

KENNEDY AND SOGNIER

By /s/ HORACE L. CHEEK, JR.
Attorneys for Defendant

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil No. 1647

(caption omitted)

ORDER OF COURT

(Filed October 12, 1965)

Defendant having filed a Motion to Dismiss plaintiff's claim of indemnity on several grounds, the indemnification clause of the contract must be reviewed.

> "He (defendant) shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work." (Page 3—Contract between plaintiff and defendant). (Parenthesis added).

Previously, the plaintiff had been adjudged negligent under a similar set of facts by the United States District Court, Eastern District, South Carolina. (AC-183). Under Order of that court it has paid to one Branham the sum of Forty-five Thousand ($45,000.00) Dollars because of its negligence on the job which plaintiff worked as a subcontractor.

The plaintiff now seeks recovery of this amount from the defendant based on the indemnification as aforestated.

It seems that plaintiff cannot succeed for several reasons.

First, in AC-183 the government attempted to involve the defendant by impleading him as a third party defendant. The court entered an Order stating that the controversy between the United States and Seckinger should

not be resolved at that time and dismissed the plaintiff's third party complaint.

The plaintiff having thus failed to implead the defendant is now seeking to do the same thing. It does not seem that they have this right. Certainly, an appeal should have been filed on the previous Order of Judge Timmerman if the plaintiff intended to prosecute their claim against Seckinger.

Moreover, the court finds that the language of the contract as alleged is not broad enough either expressly or impliedly to indemnify the government from its own negligence. Certainly, this court is bound by the fact that the government was negligent and adjudged so. As a result, the instant claim seeks indemnification from the plaintiff's own negligence. Plaintiff was in an ideal position to write more into its contract if it actually intended indemnification from its own negligence. Such a broad save harmless agreement is commonplace but none appears in the contract under consideration.

Other arguments are advanced by defendant. He strenuously maintains that he has paid his obligation for any injury to Branham, his employee, by way of compliance with the Workmens Compensation law. He also maintains there can be no contribution between joint tort feasors. He also maintains that plaintiff is attempting to go behind the South Carolina judgment in order to maintain its position. While these arguments appear meritorious, sufficient grounds to sustain the Motion have already been stated.

For all the foregoing reasons, the Motion to Dismiss of defendant is hereby granted.

This 11 day of October, 1965.

F. M. SCARLETT
Judge
United States District Court
Southern District of Georgia

JUDGMENT ON DECISION BY THE COURT

(Filed November 3, 1965)

This action came on for (hearing) before the Court Honorable F. M. Scarlett, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged in accordance with Order filed October 12, 1965, that this action be dismissed.

Dated at Savannah, Georgia, this 3rd day of November 3rd [sic], 1965.

EUGENE F. EDWARDS
Clerk
U.S. District Court,
S.D. Georgia

By /s/ LOUIS E. AENCHBACHER
LOUIS E. AENCHBACHER
Chief Dep. Clerk of Court

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 23432

UNITED STATES OF AMERICA, APPELLANT

versus

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY, APPELLEE

Appeal from the United States District Court for the Southern District of Georgia

(February 28, 1969)

Before BROWN, Chief Judge, GOLDBERG and AINSWORTH, Circuit Judges.

BROWN, Circuit Judge: This case began sounding in tort but through a simple twistification, *General Guaranty Ins. Co.* v. *Parkerson*, 5 Cir., 1966, 369 F.2d 821, of the Federal impleader rule, F.R.Civ.P. 14(a), plus a prior final judgment, it is now here after several dismissals for failure to state a claim, for a decision on the propriety of the most recent dismissal. We are called upon like many times in the past,[1] to determine if a contract[2] calls for indemnity or is merely a simple responsibility clause. This case would be one of a simple nature except for two factors: first, in a prior suit, the

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[1] American Agricultural Chemical Co. v. Tampa Armature Works, 5 Cir., 1963, 315 F.2d 856; Jacksonville Terminal Co. v. Railway Express Agency, 5 Cir., 1961, 296 F.2d 256; Travelers Ins. Co. v. Busy Electric Co., 5 Cir., 1961, 294 F.2d 139; Batson-Cook Co. v. Industrial Steel Erectors, Inc., 5 Cir., 1958, 257 F.2d 410.

[2] *The contract in this case provides:*

"He [Seckinger] shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work."

indemnitee has been found negligent, and we must decide if this bars his recovery, and second, another wrinkle, *Mike Hooks* v. *Pena*, 5 Cir., 1963, 313 F.2d 696, 1963 A.M.C. 355, is that the United States is a primary party to the contract. We are not here dealing with merely a contract entered into between two private parties. Rather we are confronted with a contract having direct and significant public interest. Cf. *J. M. Huber Corp.* v. *Denman*, 5 Cir., 1966, 367 F.2d 104.

The facts can be severally capsulated.[3] In 1956, Claimant, an employee of Contractor, was injured when he came into contact with a high voltage wire while working on a pipe job that Contractor was performing at the Paris Island Marine Depot, South Carolina. Claimant filed an FTCA suit, 28 U.S.C.A. § 1346(b) (1964), against the Government in South Carolina, for negligence in not deenergizing the wire and for not warning the workers of the danger involved. The Government filed a third-party claim[4] against Contractor alleging that Claimant's injuries were caused by Contractor's negligence, and asking for recovery against Contractor for all sums recovered by Claimant from it. Contractor, contending that the Government's third-party claim failed

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[3] Claimant:

Ernest E. Branham, injured employee of Contractor who initiated the suit and recovered a judgment against the Government.

Contractor:

M. O. Seckinger Company, employer of Claimant and the appellee-indemnitor in this appeal.

Government:

United States Government, owner for whom work was being performed by Contractor and now the appellant-indemnitee.

Claimant is not a party to this appeal by the Government.

[4] The Government brought this third-party claim against Contractor pursuant to F.R.Civ.P. 14(a) which provides:

> "*When Defendant May Bring in Third Party.* At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."

to state a claim upon which relief could be granted, moved to dismiss. The motion was granted.[5] Thereupon the suit by Claimant against the Government went to trial in the District Court in South Carolina. The Government was found negligent and Claimant awarded $45,000.

Thereafter the Government instituted the present suit against Contractor in the Southern District of Georgia asserting that Contractor's negligence caused Claimant's injuries, and that under the express terms of the contract between the parties (see note 2, *supra*), Contractor was required to indemnify the Government. Contractor's motion to dismiss this complaint was granted. The Court had a double-barrelled basis for its dismissal. The first was that this suit was barred by res judicata since the Government had not appealed from the prior dismissal of its impleader claim. The second was that a mere examination of the contract showed that it is not one which would allow the Government, who had been found negligent in a prior trial, to recover its losses from Contractor. This appeal followed.

The prior dismissal of the Government's claim (see note 5, *supra*) was without prejudice to refiling. We

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[5] In granting the motion on July 17, 1961 the Judge's order stated:

> "After hearing the arguments of counsel, I am of the opinion that the controversy between the [Government] Third-Party Plaintiff, and [Contractor] Third-Party Defendant, should not be resolved at this time and further that its inclusion in the trial of the dispute between [Claimant] and [Government] would unnecessarily and improperly complicate the issues * * *. I therefore order that the * * * complaint of the United States be dismissed with leave * * * to the United States * * * to take such further action at an appropriate time * * *."

Not because we have inherited an appeal which otherwise would have gone to the Fourth Circuit, we think subsequent events prove that nothing was to be gained by truncating the case. Since all claims were for determination by the Judge without a jury under FTCA, the complications, if any, were readily controllable. There are many ways to handle varying issues, burdens of proof, etc., in impleader, cross-claim situations. See United States Lines Co. v. Williams, 5 Cir., 1966, 365 F.2d 332, 336 n. 11, 1966 A.M.C. 2418, 2424 n. 11.

hold that dismissal on the ground of res judicata was erroneous since the Trial Court expressly left it open for the Government to pursue its claim at a later date.

The question at the outset is what law is to govern, State (South Carolina) or Federal? We think the simple answer is that Federal law must control.[6] The first and certainly one of the leading cases in this area is *Clearfield Trust Co.* v. *United States*, 1943, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838. There the Court held that "[t]he application of state law * * * would subject the rights and duties of the United States to exceptional uncertainty" 318 U.S. at 367, 63 S.Ct. at ——, 87 L.Ed. at ——. There is obviously a need for uniformity in results relative to claims presented by the United States to the Federal Courts for solution.[7] As the discussion on the ultimate merits reveals, there is more than enough difficulty in trying to synthesize a rule that could safely be followed by a multi-state corporate business enterprise in determining the construction and enforceability of indemnity contracts without imposing the same uncertainty and burden on the national sovereign in its undertaking to have contractors perform essential work within its wide sphere of governmental responsibilities. Anything having such a direct touch upon the national treasury should likewise be resolved on standards having like national uniformity. But to conclude that it is Federal law, not State (South Carolina) law, that governs, is no solution. It merely states the problem for there is no clearly defined Federal law, which means that with divergent views in the 50 states, we must make the choice.

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[6] 41 Am.Jur.2d *Indemnity* § 5 at 691 (1968).

> "Federal case law is controlling as to the right of the Federal Government to indemnification under an indemnity contract into which it has entered, and such a contract is not repugnant to the Federal Tort Claims Act or contrary to public policy."

[7] *Cf.* Petty v. Tennessee-Missouri Bridge Comm'n, 1959, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804; United States v. Jones, 9 Cir., 1949, 176 F.2d 278. *See* Free v. Bland, 1962, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180; Royal Indemnity Co. v. United States, 1941, 313 U.S. 289, 61 S.Ct. 995, 85 L.Ed. 1361; Security Life & Accident Ins. Co. v. United States, 5 Cir., 1966, 357 F.2d 145.

At the outset the Government seeks to escape from the necessity of any choice and certainly the prospect of our adopting, as a Federal rule, the majority rule. It does this by asserting that its agreement with Contractor is not one for indemnity at all, whether indemnity based upon the Government's negligence as indemnitee or the indemnitor-Contractor's negligence, or a mixture of both. It insists that the engagement is a simple but direct one of putting responsibility on Contractor for all damages to property or persons, although its manner of statement and the absence of the classic terminology of indemnity might well have a bearing upon how it is to be construed and applied. We think this is a much too literal, unrealistic approach. If the Government is right on the construction of it, then in its operative effect it will afford to the Government all of the advantages of an indemnity and will impose on Contractor all of the correlative disadvantages. Thus the stage is set for a determination of the significance negligence on the part of the indemnitee should have. For a while this case suffers from all of the uncertainties of a swift and unilluminating disposition on bare bones pleadings.[8]

The very assertion of the case by the Government inevitably casts it in the role of a negligent actor. The Government's claim against Contractor rests on the fact that it has had to pay substantial sums to Claimant and this was the direct result of a finding of negligence on its part. Its allegation that Contractor was negligent and that this negligence of the Contractor, not that of

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[8] As we recently said in Barber v. M/V Blue Cat, 5 Cir., 1967, 372 F.2d 626, "at this day and time dismissal of a claim—land-based, waterborne, amphibious, equitable, legal, maritime, or an ambiguous, amphibous mixture of them all—on the basis of the barebone pleadings is a precarious one with a high mortality rate." *Id.* at 627. The test for a dismissal without a fact finding, articulated in Conley v. Gibson, 1957, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80, is "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46, 78 S.Ct. at 102, 2 L.Ed.2d at ——. This brings us to the asserted facts of the claim and the terms of the contract.

the Government, was the real proximate cause of Claimant's injuries does not save the day. It simply precipitates the problem of whether this contract (see note 2, *supra*) imposes on Contractor the burden of absorbing all of the loss brought about by active negligence of the indemnitee if, in some appreciable way, negligence even though slight, of the indemnitor contributed to the damage.

That question is essentially one of contract construction, but a construction viewed from the standpoint of the parties, their relative freedom of action and real bargaining strength and the principles of construction imposed by the pertinent law (State or Federal) concerning the liberality or strictness with which such agreements are to be read. For we would certainly not consider for a moment in fashioning Federal law, that a contract to indemnify one against the consequences of the indemnitee's own negligence is contrary to public policy and thus void altogether, even though there is some division among the courts.[9]

In approaching this as a question of law, really choice of law, governing Federal contracts and contractual relationships with governmental contractors, we think everything points toward the desirability of seeking not only a uniformity for the national sovereign but doing that in a way which will more or less simultaneously effect a uniformity with local law. The easiest way to achieve that is to declare that the Federal interest will best be served by choosing the majority rule. Of course, to choose the law is not to eliminate uncertainty or difficulty or the possibility of variable results. But it will lay a standard concerning the approach which the re-

[9] Some jurisdictions hold such a contract void ab initio as against public policy. Woodbury v. Post, 19—, 158 Mass. 140, 33 N.E. 86; Sternman v. Metropolitan Life Ins. Co., 19—, 170 N.Y. 13, 62 N.E. 763. Other courts hold that such contracts are not void, cf. National Surety Corp. v. Rauscher, Pierce Co., 5 Cir., 1966, 359 F.2d 572, 577.41 Am.Jur.2d *Indemnity* § 9, at 694 (1968): "[I]t is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence provided the indemnity against such negligence is made unequivocally clear in the contract."

viewing court is to have and those principles which the court may properly regard to be the performance of acceptable judicial functions and prerogatives.

The majority rule has been variously stated. 41 Am. Jur. 2d § 15, at 701 (1968): "[A]n overwhelming majority of jurisdictions adhere to the general rule requiring an unequivocal expression of intent before allowing indemnity for the indemnitee's own negligence * * *."

Although this court in *Jacksonville Terminal*[10] rejected

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[10] Jacksonville Terminal Co. v. Railway Express Agency, Inc., 5 Cir., 1962, 296 F.2d 256, *cert. denied*, 369 U.S. 860, 82 S.Ct. 949, 8 L.Ed.2d 18. However, *Jacksonville* which spoke for Florida only now apparently is but an historical marker for it now joins the many other cases where the highest state courts within the Fifth Circuit have declined to follow our *Erie* judgments. W.S. Ranch Co. v. Kaiser Steel Corp., 10 Cir., 1967, 388 F.2d 257, 264-65 n. 11-14, *reversed*, 1968, —— U.S. ——, 88 S.Ct. ——, 20 L.Ed.2d 835.

In Gulf Oil Corp. v. Atlantic Coast Line R.R., Fla. Dist. Ct. App., 1967, 196 So. 2d 456, *cert. denied*, Fla., 1967, 201 So. 2d 893, the Florida District Court of Appeal expressly declined to follow *Jacksonville* stating that there were strong indications since *Jacksonville* that Florida Courts would adopt the majority rule. After analyzing *Jacksonville*, the Florida cases, and rejecting it and the idea that a clause reading essentially the same as that in *Jacksonville* was adequate, the *Gulf* Court concluded: "It is evident, then, that Florida decisions hold that an indemnity agreement which indemnifies against the indemnitee's own negligence must state this in 'clear and unequivocal' language."

"* * * there must be language *specifically* designating indemnification against one's own negligence." 196 So. 2d at 459. (Emphasis in original).

This authoritative choice by a Florida Court of Appeal bears the stamp of approval evidenced by the denial of certiorari by the Florida Supreme Court. Unlike the equivocal counterpart in the Federal system, denial of certiorari stands for much in Florida. As we said in Miami Parts & Spring, Inc. v. Champion Spark Plug Co., 5 Cir., 1966, 364 F.2d 957, 965-66, n. 7, quoting Hunter v. Tyner, Fla., 1942, 10 So. 2d 492: "A writ of [certiorari] being simply a method of procedure by which such appeals authorized by the statute can be brought to this Court, its denial, we think, was an adjudication of the propriety of the order involved and it could not again be questioned in this appeal."

We went on, quoting Advertects, Inc. v. Sawyer Indus., Fla., 1953, 64 So. 2d 300: "The order appointing the receiver was reviewed by this Court on a petition for writ of certiorari and

the "majority rule" for Florida because it "rests on an unsound and dangerous foundation" 296 F.2d 256, 262, and because "the majority rule presumes that courts have the power to alleviate or eliminate this burden by construing the indemnity agreement in a manner which is patently inconsistent with the plain and clear meaning of the language employed by the contracting parties" and thus constitutes "a dangerous and unwarranted extension of the judicial function" 296 F.2d 256, 262, it recognized that the so-called majority rule had been fairly stated in *Batson-Cook*.[11] We described the process of contract construction in *Batson-Cook* this way. "[I]n this process, it is the law which steps in and tells the parties that while it need not be done in any particular language or form, unless the intention is unequivocally expressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence. The question then is: does the specific contract in dispute clearly reflect such a purpose?" 257 F.2d at 412.[12]

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this Court affirmed the order of the chancellor by denying the petition for writ of certiorari." 364 F.2d at 966.

We are not unmindful of a later Florida Appellate decision purporting to adopt the minority rule, Thomas Awning & Tent Co. v. Toby's Twelfth Cafeteria, Inc., Fla. Dist. Ct. App., 1967, 204 So. 2d 756, where one Judge dissented on the basis of *Gulf, supra*. However, by direct communication with the Clerk of the Florida Supreme Court we are advised that certiorari was not applied for in that case. It is therefore our *Erie* judgment that the majority rule adopted for Florida in *Gulf, supra*, stands as the latest authoritative pronouncement of Florida Law.

[11] Batson-Cook Co. v. Industrial Steel Erectors, 5 Cir., 1958, 257 F.2d 410. American Ag. Chem. Co. v. Tampa Armature Works, 5 Cir., 1963, 315 F.2d 856 (concurring opinion). This was, of course, an *Erie* declaration for Alabama which may have been superseded by the Alabama Supreme Court in Republic Steel Corp. v. Payne, Ala., 1961, 132 So.2d 581, 586.

[12] In footnote 3 of *Batson-Cook* we were at pains to list the number of cases from this Court echoing this accepted principle and finding now an agreement which did cover the indemnitee's negligence and others holding to the contrary, depending upon the wording, setting, and other guides toward divination of the so-called intent of the parties.

We undertook also, to make quite plain that the contract need not contain the talismanic words "even though caused, occa-

Of course, to state the rule which is a guide to the court's approach hardly determines the case. Indeed, the travail just begins. Except where the words are identical, little is to be gained by comparing this case with that, or matching this phraseology against another. Indeed, the same words frequently receive contradictory constructions at the hands of the highest appellate courts separated only by the imaginary boundary line of contiguous states. The "intention" of the parties is frequently more the statement of a result than a statement of a reason why. So much is wrapped up in the policy considerations which this or that jurisdiction considers within the proper scope of the judicial function or of critical relevance. See *American Ag. Chem. Co.* v. *Tampa Armature Works, supra* (concurring opinion). Added to this is the fact that for every similarity there is a dissimilarity. It begins and ends then as a matter of the law, that is, through the judicial function, construing the contract. That depends on that contract.

When we zero in on this particular contract (see note 2, *supra*) from the standpoint of the position of the parties at the time the contract was made,[13] we find no sign pointing unequivocally to a purpose on the part of a small subcontractor performing some integral part of a Government contract to take upon its shoulders the unlimited obligation either in terms of dollars or events precipitating damage to others when caused primarily

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sioned, or contributed to by the negligence, sole or concurrent of the indemnitee," or like expressions. 257 F.2d at 412.

Although the District of Columbia Circuit accepts the majority rule's requirement that the intention to indemnify against the indemnitee's negligence must clearly appear, Moses-Ecco Co. v. Roscoe-Ajax Corp., D.C. Cir., 1963, 320 F.2d 685, 687 citing *Batson-Cook*, at 688 n.2 it properly declined to follow it if it was read to require the presence of the talismanic words.

[13] When dealing with the construction of a contract, the court must place itself in the place of the parties and determine their mutual intent. J. M. Huber Corp. v. Denman, 5 Cir., 1966, 367 F.2d 104; American Oil Co. v. Hart, 5 Cir., 1966, 356 F.2d 657; American Ag. Chem. Co. v. Tampa Armature Works, Inc., 5 Cir., 1963, 315 F.2d 856. *Cf.* Indemnity Ins. Co. v. DuPont, 5 Cir., 1961, 292 F.2d 569; Fidelity-Phenix Fire Ins. Co. v. Farm Air Service, Inc., 5 Cir., 1958, 255 F.2d 658.

by the active direct negligence of the Government simply because in the judicial scales some slight dereliction of the Contractor occurred which, among joint tort feasors the law would recognize. The very nature of the National Government argues against any but the largest of industrial enterprises as Governmental contractors, rationally undertaking such far-flung burdens. There is first the very size, the immensity, of Government. This is complicated more frequently as a matter of necessity, by security considerations which close to the private contractor any access to information, sometimes of the most rudimentary kind, by which a contractor could ascertain whether it was reasonably safe to rely upon the expectation that the Government would do its part to minimize risks in today's complex, frequently hazardous, Governmental contract operations. Of course, this is not to make the contract in terms here employed superfluous at all. The Contractor bears full responsibility for damage occasioned by his negligence alone or his negligence in connection with other contractors or subcontractors [14] or members of the public, excluding only the Government as indemnitee.[15] It also supplies a procedural device to assure effective legal recourse by the negligence-free Government against the negligent Contractor.[16] The argument sometimes made, that contracts of this kind must be read to include the indemnitee's negligence, for otherwise there would be no occasion to demand hold-harmless indemnity, is extremely superficial. With stakes so high today, parties frequently pay out substantial, huge sums of money in settlement, frequently with the acquiescence

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[14] Cf. Travelers Ins. Co. v. Busy Elec. Co., 5 Cir., 1961, 294 F.2d 139; Halliburton v. Norton Drilling Co., 5 Cir., 1962, 302 F.2d 431.

[15] 41 Am.Jur.2d *Indemnity* § 16, at 703 (1968):

> "Where the injury was caused by the concurrent negligence of the indemnitor and the indemnitee, the courts have frequently read into contracts of indemnity exceptions for injuries caused in part by the indemnitee, although there is authority to the contrary."

[16] See, e.g., American Ag. Chem. Co. v. Tampa Armature Works, 5 Cir., 1963, 315 F.2d 856, 861 n.3 (concurring opinion).

and approval of the indemnitor, reserving questions vis-a-vis themselves for later determination. See, e.g., *James F. O'Neil Co.* v. *United States Fidelity & Guaranty Co.*, 5 Cir., 1967, 381 F.2d 783.

For these reasons the Government fails on its contract construction theory. But the Government, as do all other parties today, when everything else fails, falls back on the Tinker-to-Evers-to-Chance multiple impleaders in the *Sieracki-Ryan-Yaka* situations of indemnity based upon breach of the WWLP—the breach of the warranty or workmanlike performance.[17] So far this court has kept this newly formed concept strictly confined to salt water or at least amphibious applications.[18]

The Government has been found guilty of active negligence proximately causing substantial injuries to the Claimant. Contractor, even though guilty of some concurring negligence, has no obligation under this contract to indemnify the Government against the consequences of the Government's neglect.

AFFIRMED.

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[17] D/S Ove Skou v. Hebert, 5 Cir., 1966, 365 F.2d 341, 1966 A.M.C. 2223; United States Lines v. Williams, 5 Cir., 1966, 365 F.2d 332, 1966 A.M.C. 2418.

[18] See Halliburton v. Norton Drilling Co., 5 Cir., 1962, 302 F.2d 431, 436.

The United States urges for the resolution of this case the adoption of the implied-indemnity theory of Ryan Stevedoring Co. v. Pan-Atlantic Steamship Co., 1956, 350 U.S. 124, 78 S.Ct. 232, 100 L.Ed. 133, which allowed indemnity to the shipowner from the stevedore because the stevedore "breached his duty to do the job safely" and his failure to do so gives rise to a cause of action in implied indemnity. This principle of law is indeed Federal in nature, but it is not the appropriate one for the resolution of this case. This Court in Halliburton v. Norton Drilling Co., 5 Cir., 1962, 302 F.2d 431, 436, declined to apply Ryan. In fact, this Court held in Koninklyke v. Strachan Shipping Co., 5 Cir., 1962, 301 F.2d 741, that "the express indemnity agreement may have waived any possible implied one." In Centraal Strikstof Verkoopkanter v. Walsh Stevedoring Co., 5 Cir., 1967, 380 F. 2d 523, this Court held that "[t]he implied warranty established in Ryan is a product of the admiralty courts and a creature of the admiralty law * * *. The cases in which the doctrine has been applied have been admiralty cases which presented substantially similar circumstances to those existing in *Ryan*." *Id.* at 529.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1966

No. 23432

D. C. Docket No. 1647—Civil Action

UNITED STATES OF AMERICA, APPELLANT

versus

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY, APPELLEE

Appeal from the United States District Court
for the Southern District of Georgia

Before BROWN, Chief Judge, GOLDBERG and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, United States of America, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 28, 1969

Issued as Mandate: March 26, 1969.

SUPREME COURT OF THE UNITED STATES

No. 395, October Term, 1969

UNITED STATES, PETITIONER

v.

M. O. SECKINGER, JR., ETC.

ORDER ALLOWING CERTIORARI—Filed October 13, 1969

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 368341 312

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

UNITED STATES OF AMERICA, PETITIONER

v.

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The order of the district court dismissing the government's complaint (App. C, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on February 28, 1969. By order entered on May 27, 1969, Mr. Justice Black extended

the time for filing this petition to and including July 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether negligence attributable to the United States precludes it from obtaining indemnification from a negligent government contractor under a standard form contractual indemnity provision which makes the contractor "responsible for all damages to persons or property that occur as a result of his fault or negligence." [1]

REGULATORY PROVISIONS INVOLVED

Title 44 of the Code of Federal Regulations (1949 ed.), as amended to January 1, 1957 (1957 Cum. Supp.), provided in relevant part:

> Sec. 54.1 *Forms to be used.* Except as otherwise authorized, the following standard forms shall be used without deviation by all Executive agencies for or in connection with every formal contract of the kinds specified that may be entered into by them:
>
> * * * *
>
> (c) *Construction contracts.* (1) U.S. Standard Form No. 23-Rev., approved by the Sec-

[1] If certiorari is granted, we reserve the right to brief and argue the additional question whether, wholly aside from the effect of the contractual indemnity provision, the United States is entitled to recover in this case on a theory of breach of implied warranty, *i.e.*, the contractor's failure to perform its contract in a safe and workmanlike manner. See *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124.

retary of the Treasury, Revised April 3, 1942—for fixed-price contracts for the construction or repair of public buildings or works.

* * * *

Sec. 54.13 *Construction contract.*
U.S. Standard Form No. 23—Rev.

* * * *

ART. 10. *Permits and responsibility for work.* The contractor shall * * * be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work * * *.

The regulations presently in force are essentially milar. See 41 C.F.R. (1969 rev.) 1-16.401, 1-16.402, -16.404, 1-16.901-23A-Art. 12.

STATEMENT

This case arises out of a 1956 accident which inured one of respondent Seckinger Company's employees, one Branham, while he was working at the Parris Island Marine Depot in South Carolina under a contract between Seckinger and the government. Branham, a steamfitter, walked across the steam pipe he was installing to assist a fellow employee; in doing so, he came against a live, uninsulated electric wire carrying 2400 volts of electricity, and was burned and thrown to the ground by the resulting shock. Branham received Workmen's Compensation payments from the South Carolina authorities (R. 9, 13), and then sued the United States in the United States District Court for the Eastern District of South Carolina

under the Federal Torts Claims Act, 28 U.S.C. 2671 *et seq.*, claiming that it had been negligent in failing both to deenergize or insulate the wire near the work site and to warn the workers of the dangers involved.

The United States sought to implead the Seckinger Company as a third party defendant at that time, alleging that Branham's injuries were caused by Seckinger's negligence and seeking indemnification for any government liability under a contract clause providing that the contractor (Seckinger)

> shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work [R. 6, 12].

On Seckinger's motion, however, the trial judge dismissed the third-party complaint without prejudice, finding that the controversy it presented "should not be resolved at this time and further that its inclusion in the trial of [Branham's complaint] would unnecessarily and improperly complicate the issues [raised herein]" (R. 5). Thereafter, in the summer of 1961, the district court found the government to have been negligent and awarded Branham judgment for $45,000 and costs, which the government has paid.

In September, 1964, the United States instituted the present action against the Seckinger Company in the United States District Court for the Southern District of Georgia. The complaint was in two counts. The first count was based upon the contractual indemnity provision quoted above, alleging facts constituting proximately causal negligence on Seckinger's part: failure to request that the lines be deenergized or in-

sulated; failure to provide safety insulation; permitting, even directing, Branham to work near the live wires;[2] and failure to prevent him from proceeding in a dangerous manner. (R. 6). The second count alleged the same facts, adding that "having undertaken to perform the contract * * * the defendant * * * [was] obligated to perform the work properly and safely and to provide workmanlike service * * *" (R. 7), which it had failed to do. Seckinger moved to dismiss the complaint, and the district court did so. In its brief opinion, it reasoned (1) that the government should have appealed the dismissal of its third-party complaint in Branham's action, and was foreclosed from initiating independent proceedings against Seckinger; and (2) that the contract clause did not permit indemnification of the government for its own negligence and—government negligence having been found in Branham's action—such indemnification was necessarily sought in this suit.

On appeal, the United States Court of Appeals for the Fifth Circuit rejected the district court's first ground of decision, noting that in dismissing the third party complaint the trial judge had specifically invited the present suit. It agreed, however, with the district court's second ground of decision. The court reasoned that since the government had been found negligent in the prior action, any indemnification which it might obtain would necessarily be indemnification for its own negligence. Whether such indemnification would

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[2] At the trial of Branham's action, he testified that his foreman, a Seckinger employee, had ordered him to make the crossing that led to his injury. (See pp. 34-38 of the transcript of that action, lodged herewith.)

be proper under a government contract was a matter of federal rather than state common law; as the federal rule, the court adopted the "majority rule" among the states—that indemnification for an indemnitee's own negligence will be allowed only if there is an "unequivocal expression of intent" to require such indemnification in the contract. Since it found no such statement in the contract, the court concluded that indemnification could not be required.

REASONS FOR GRANTING THE WRIT

The court of appeals has decided an important question of federal law—what contractual language is required to entitle the government to indemnity for the consequences of a contractor's negligence where the government's negligence has also contributed to the injury. In so doing, it adopted the "majority rule" among the states, that indemnification for an indemnitee's own negligence will be allowed only if there is an "unequivocal expression of intent" in the contract, and extended that rule to the case where both parties' negligence contributes to the injury. This question has not been, but should be settled by this Court. The decision below is erroneous and is in conflict with the federal law applicable to maritime contracts containing identical provisions.

The principle applied by the court below exposes the government to the possibility of extensive liability for damages not fully its fault. The contractual provision in issue, which the court found did not constitute an unequivocal expression of intent, required the contractor to assume responsibility for "*all* damages * * *

that occur *as a result of his* fault or negligence" (emphasis supplied). Such language has been required by federal regulation for all government fixed-price construction contracts at least since 1938. 41 C.F.R. (1938 ed.) 11.1, 11.3, 12.23 Art. 10; 41 C.F.R. (1943 Cum. Supp.) 11.4(c), 12.23 Art. 10; 41 C.F.R. (1949 ed.) 4.1(c), 4.13 Art. 10; 44 C.F.R. (1957 Cum. Supp.) 54.1(c), 54.13 Art. 10; 41 C.F.R. (1961 rev.) 1-16.401, 1-16.402, 1-16.404, 1-16.901-23A Art. 11; 41 C.F.R. (1969 rev.) 1-16.401, 1-16.402, 1-16.404, 1-16.901-23A Art. 12. See also Armed Services Procurement Regulation 7-602.13 (CCH 1968). While the regulations could be changed, any change would be entirely prospective, and could not affect the contracts already made under these regulations, as to which we are informed that there are over 200 government indemnity suits pending at the present time. The opinion below, if followed, will foreclose any recovery by the government in these cases, which involve a potential government recovery of some $30 million. It is thus apparent that the question is a recurring one, possessing substantial importance.

1. The court of appeals erred not only in adopting the "majority rule", but even more fundamentally in treating this case as one in which the government seeks indemnity from the contractor for its own negligence. Rather, the government's complaint seeks only to enforce the specific agreement in the contract that Seckinger should be responsible for all damages proximately caused by Seckinger's negligence. It is commonplace that there may be more than one proximate cause of injury, see, *e.g.*, *Porello* v. *United*

States, 153 F.2d 605, 607 (C.A. 2), remanded, 330 U.S. 446; here the complaint seeks indemnification only for the damage which Seckinger itself proximately caused.[3] Thus, this is not a situation like that in which the majority rule has most frequently been articulated, where an indemnitee seeks to hold an entirely non-negligent contractor responsible for the consequences of the indemnitee's own negligence. Where a contractor is faultless, "Courts are understandably reluctant to allow a negligent indemnitee to invoke general language [of indemnification] * * * to recover from a faultless indemnitor." *Associated Engineers, Inc.* v. *Job*, 370 F.2d 633, 651 (C.A. 8), certiorari denied, 389 U.S. 823.

Application of the rule even in the case of a faultless contractor has been soundly criticized by another panel of the court below in a diversity action governed by state law:

> [T]he majority rule rests on an unsound and dangerous foundation.
>
> It presumes, first of all, that one party's assumption of liability for losses due to another's negligence is an "unusual" and "hazardous" undertaking. We cannot agree. In the light of mod-

[3] The complaint having been dismissed, it must be assumed that the government can prove that Branham's injury did occur as a result of Seckinger's fault or negligence. The court of appeals' assertion that that injury was "caused primarily by the active direct negligence of the Government" and that the contractor was guilty at most of "some slight dereliction," *infra* at pp. 26-27, is unwarranted at this stage in the litigation. No such findings appear, or would have been appropriate, in connection with Branham's damage suit, since only the government was a party there.

ern conditions, we perceive little justification for so characterizing the indemnitor's obligation. Insurance companies assume this obligation every day, especially in connection with automobile liability policies. And, it is common knowledge that the device of insuring against one's own negligence through indemnity contracts is frequently employed in other business ventures.

Perhaps more important, even assuming that the burden imposed on the indemnitor is "unusual" or "hazardous", the majority rule presumes that courts have the power to alleviate or eliminate this burden by construing the indemnity agreement in a manner which is patently inconsistent with the plain and clear meaning of the language employed by the contracting parties. This is a dangerous and unwarranted extension of the judicial function. * * * [W]here, as here, a contract does not violate public policy, we have no authority to achieve the same result by concluding that the parties did not really mean what the unambiguous language of their agreement imports.

Jacksonville Terminal Co. v. *Railway Express Agency, Inc.*, 296 F.2d 256, 262-263. The reasoning applies *a fortiori* here, where the contractor himself was among those responsible for the injuries in question without regard to the negligence of the government, the other party to the contract. Certainly there is nothing in the policy underlying the "majority rule" that justifies the determination of the court below to foreclose the government from seeking indemnification

no matter how negligent the contractor may have been or to what extent that negligence proximately caused the injuries complained of, so long as the government itself was also negligent in some degree.

We perceive no equivocation in the contractor responsibility clause. It plainly provides that the contractor shall be responsible for *all* damages *his* negligence causes (irrespective of any government contribution). Moreover, there are important reasons of policy for construing the clause to mean what it says. Contractors are generally covered by state workmen's compensation programs and hence insulated from direct negligence liability to their employees. Only if there is a third party, such as the government was in this case, will the employee have any chance to assert tort liability; then, any concurrent negligence on the third party's part will enable him to recover his entire damages from it, often in substantial amounts. Usually, however, as here, it is the contractor which is in direct control of the manner and conditions of work and thus is best situated to prescribe safe industrial practices. The third party's negligence may consist only in failing to provide a safe place to work or directly to transmit warning of dangerous conditions—failures which the contractor could and should have remedied. Compare *Associated Engineers, Inc., supra.* In such circumstances it is unfair to require the third party to bear the entire burden of tort liability just because it is the

only available defendant. The indemnity obligation not only redresses that imbalance, but also gives the contractor a necessary and desirable incentive to assure safe work methods and conditions for his employees.

The consequence of following the court's ruling would be to deprive the contractor responsibility clause of any substantial effect. The government is not subject to tort liability without fault on its part. *Dalehite* v. *United States*, 346 U.S. 15, 44-45; 28 U.S.C. 2671 *et seq.* Despite the court's contrary suggestion, *infra* p. 28, even a settlement or compromise of a claim by the government could be authorized only for injury "caused by the negligent or wrongful act or omission of a federal employee," 28 U.S.C. 2672; a case could not lawfully be settled to postpone resolution of the question of negligence to an action between the government and its indemnitor, if the responsible government officials believed the government's acts had not wrongfully contributed to the injury complained of. Thus the contractual provision could become operative as an indemnity clause only in situations where the United States had been adjudicated negligent or had in effect conceded its negligence through compromise or settlement. But the court of appeals ruled that a negligent contractor would not be required to indemnify the government for the consequences of its negligence if the government was also negligent. Since such negligence will always be present if the government is liable, the court's reading of the clause denies it all practical meaning. *Porello* v.

United States, supra, 153 F.2d at 609; *National Transit Co.* v. *Davis,* 6 F.2d 729, 730-733 (C.A. 3).

2. Both the "unequivocal expression of intent" requirement generally and the court's application of that rule to the provision involved in this case are in conflict with prior decisions of this court and the Second Circuit involving maritime contracts containing identical language.

In *Porello* v. *United States,* 153 F.2d 605 (C.A. 2), remanded 330 U.S. 446, applied on remand, 94 F. Supp. 952 (S.D.N.Y.), a stevedoring company had contracted to perform services for a government vessel, and undertook to be responsible "for any and all damage or injury to persons and cargo * * * through the negligence or fault of the Stevedore, his employees and servants." 330 U.S. at 457. One of the company's employees was injured through the concurrent negligence of the company and the government. He sued the government, which in turn claimed and obtained in the court of appeals full indemnification under the quoted provision. On petition for rehearing and in this Court, the stevedoring company argued for the "majority rule", claiming that the quoted language did not constitute an unequivocal expression of intent. 153 F.2d at 609; Brief for Petitioner, No. 69, O.T. 1946, 36-41. The court of appeals rejected that argument on the ground that, as "the United States could be liable only if itself at fault * * * [that] construction * * * would make the indemnity provision meaningless." 153 F.2d at 609. This Court passed over the argument and adopted instead the alternative suggestion of petitioner's brief, that the case be remanded

for a determination what the intention of the quoted language actually was. Brief for Petitioner, *supra*, at 41-42; 330 U.S. at 457. Obviously such a remand would have been pointless if the government's indemnification rights depended upon an *unequivocal* expression of intent; the Court necessarily determined that they did not. When, on remand, the stevedoring company refused to come forward with any evidence concerning the intent of the clause, the district court ruled that the court of appeals' interpretation therefore remained in effect. The Second Circuit has subsequently reaffirmed its holding in *Porello* that a clause so worded requires full indemnification. *A/S J. Ludwig Mowinckels Rederi* v. *Commercial Stevedoring Co.*, 256 F.2d 227, 231.[4]

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[4] The Fifth Circuit's decision is also in direct conflict with recent district court decisions. *United States* v. *Accrocco* (D.D.C., Civil Action 2853-65, decided March 21, 1969; *Fisher* v. *United States* (E.D. Pa., Civil Action No. 31345, decided April 23, 1969); but see *Troy S. Morris* v. *United States* (D. N. Mex., Civil No. 7136, decided December 13, 1968); *Percivill* v. *United States* (S.D. Tex., Civil No. 66-C-31, decided June 23, 1969). See also the following cases allowing indemnity under similar contractual indemnity provisions where both parties were negligent: *Associated Engineers, Inc.* v. *Job*, 370 F. 2d 633, 650 (C.A. 8), certiorari denied, 389 U.S. 823; *Jacksonville Terminal Co.* v. *Railway Express Agency, Inc.*, 296 F. 2d 256, 262-263 (C.A. 5), certiorari denied, 369 U.S. 860; *National Transit Co.* v. *Davis*, 6 F. 2d 729 (C.A. 3); *United States Steel Corp.* v. *Emerson-Comstock Co.*, 141 F. Supp. 143, 146 (N.D. Ill.); *Union Pac. R. Co.* v. *Ross Transfer Co.*, 64 Wash. 2d 486, 488, 392 P. 2d 450, 451; *Moses-Ecco Co.* v. *Roscoe-Ajax Corp.*, 320 F. 2d 685, 688 (C.A.D.C.); *Insurance Co. of North America* v. *Elgin, Joliet & Eastern Ry. Co.*, 229 F. 2d 705, 712 (C.A. 7); *Newberg Const. Co.* v. *Fischbach*, 46 Ill. App. 2d 238, 196 N.E. 2d 513.

The conflict between these holdings and the holding below is not blunted by the fact that they arose in a maritime context. There are no special maritime considerations—and none are suggested in the *Porello* opinion or briefs—to justify one rule for interpreting maritime contracts of indemnity and another rule applicable to federal contract cases generally. Indeed, the parties and this Court all agreed that the indemnity feature of the *Porello* contract had no special maritime nature. Brief for Petitioner pp. 48-52; Brief for the United States, pp. 45-50; 330 U.S. at 456.[5] There should be a single federal rule for interpretation of all indemnity obligations imposed by government contracts; the Fifth Circuit's opinion precludes such uniformity, and frustrates the government's justified reliance on the prior cases.

3. For the reasons stated, we believe the government's contract entitles it to *full* indemnity if it can prove the allegations of its complaint. The court below held it entitled to none. As this Court recognized in *Porello*, however, 330 U.S. at 458, there is a third possible meaning to the provision—that the government is to be indemnified on a comparative basis, to the extent a contractor's negligence contributed to a damage award. Since the government's non-liability in the absence of fault renders the clause meaningless if the view below is adopted, any ambiguity there may be involves the choice between full and partial indemnification. Accordingly, we urge in the alter-

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[5] Admiralty jurisdiction was founded on the maritime nature of the underlying tort. *Ibid.*

native that an award of damages to the government on a comparative basis represents the minimum relief to which it is entitled under the indemnity provision. Such an interpretation would find support in several recent cases. *Brogdon* v. *Southern Railway Co.*, 384 F.2d 220 (C.A. 6); *Mayer* v. *Fairlawn Jewish Center*, 38 N.J. 549, 186 A.2d 274; *Williams* v. *Midland Constructors, et al.*, 221 F. Supp. 400, 403 (E.D. Ark.); *C & L Rural Elec. Coop. Corp.* v. *Kincaid*, 221 Ark. 450, 458, 256 S.W.2d 337, on remand, 227 Ark. 321, 299 S.W.2d 67. It would make possible at least a partial enforcement of the liability assumed by the contractor under the indemnity provision, while entirely avoiding any appearance that the contractor is being made to indemnify the government for the government's own fault.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
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Assistant Attorney General.

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RONALD R. GLANCZ,
Attorneys.

JULY 1969.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23432

UNITED STATES OF AMERICA, APPELLANT

versus

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY, APPELLEE

Appeal from the United States District Court
for the Southern District of Georgia

(February 28, 1969)

Before BROWN, Chief Judge, GOLDBERG and AINSWORTH, Circuit Judges.

BROWN, Chief Judge: This case began sounding in tort but through a simple twistification, *General Guaranty Ins. Co.* v. *Parkerson*, 5 Cir., 1966, 369 F.2d 821 of the Federal impleader rule, F.R.Civ.P. 14 (a), plus a prior final judgment, it is now here after several dismissals for failure to state a claim, for a decision on the propriety of the most recent dismissal. We are called upon like many times in the past,[1] to

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[1] American Agricultural Chemical Co. v. Tampa Armature Works, 5 Cir., 1963, 315 F.2d 856; Jacksonville Terminal Co. v. Railway Express Agency, 5 Cir., 1961, 296 F.2d 256; Travelers Ins. Co. v. Busy Electric Co., 5 Cir., 1961, 294 F.2d 139; Batson-Cook Co. v. Industrial Steel Erectors, Inc., 5 Cir., 1958, 257 F.2d 410.

letermine if a contract[2] calls for indemnity or is nerely a simple responsibility clause. This case would ›e one of a simple nature except for two factors: first, n a prior suit, the indemnitee has been found negli-ent, and we must decide if this bars his recovery, and econd, another wrinkle, *Mike Hooks* v. *Pena*, 5 Cir., 1963, 313 F.2d 696, 1963 A.M.C. 355, is that the Jnited States is a primary party to the contract. We ire not here dealing with merely a contract entered nto between two private parties. Rather we are con-ronted with a contract having direct and significant ›ublic interest. Cf. *J. M. Huber Corp.* v. *Denman*, 5 Cir., 1966, 367 F.2d 104.

The facts can be severaly capsulated.[3] In 1956, Claimant, an employee of Contractor, was injured when he came into contact with a high voltage wire while working on a pipe job that Contractor was per-forming at the Paris Island Marine Depot, South Carolina. Claimant filed an FTCA suit, 28 U.S.C.A.

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[2] *The contract in this case provides:*

"He [Seckinger] shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work."

[3] Claimant:

Ernest E. Branham, injured employee of Contractor who initiated the suit and recovered a judgment against the Government.

Contractor:

M. O. Seckinger Company, employer of Claimant and the appellee-indemnitor in this appeal.

Government:

United States Government, owner for whom work was being performed by Contractor and now the appellant-indemnitee.

Claimant is not a party to this appeal by the Government.

§ 1346(b) (1964), against the Government in South Carolina, for negligence in not deenergizing the wire and for not warning the workers of the danger involved. The Government filed a third-party claim[4] against Contractor alleging that Claimant's injuries were caused by Contractor's negligence, and asking for recovery against Contractor for all sums recovered by Claimant from it. Contractor, contending that the Government's third-party claim failed to state a claim upon which relief could be granted, moved to dismiss. The motion was granted.[5] Thereupon the suit by

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[4] The Government brought this third-party claim against Contractor pursuant to F.R.Civ.P. 14(a) which provides:

> "*When Defendant May Bring in Third Party.* At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."

[5] In granting the motion on July 17, 1961 the Judge's order stated:

> "After hearing the arguments of counsel, I am of the opinion that the controversy between the [Government] Third-Party Plaintiff, and [Contractor] Third-Party Defendant, should not be resolved at this time and further that its inclusion in the trial of the dispute between [Claimant] and [Government] would unnecessarily and improperly complicate the issues * * *. I therefore order that the * * * complaint of the United States be dismissed with leave * * * to the United States * * * to take such further action at an appropriate time * * *."

Not because we have inherited an appeal which otherwise would have gone to the Fourth Circuit, we think subsequent events prove that nothing was to be gained by truncating the case. Since all claims were for determination by the Judge without a jury under FTCA, the complications, if any, were readily controllable. There are many ways to handle varying

Claimant against the Government went to trial in the District Court in South Carolina. The Government was found negligent and Claimant awarded $45,000.

Thereafter the Government instituted the present suit against Contractor in the Southern District of Georgia asserting that Contractor's negligence caused Claimant's injuries, and that under the express terms of the contract between the parties (see note 2, *supra*), Contractor was required to indemnify the Government. Contractor's motion to dismiss this complaint was granted. The Court had a double-barrelled basis for its dismissal. The first was that this suit was barred by res judicata since the Government had not appealed from the prior dismissal of its impleader claim. The second was that a mere examination of the contract showed that it is not one which would allow the Government, who had been found negligent in a prior trial, to recover its losses from Contractor. This appeal followed.

The prior dismissal of the Government's claim (see note 5, *supra*) was without prejudice to refiling. We hold that dismissal on the ground of res judicata was erroneous since the Trial Court expressly left it open for the Government to pursue its claim at a later date.

The question at the outset is what law is to govern, State (South Carolina) or Federal? We think the simple answer is that Federal law must control.[6] The

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issues, burdens of proof, etc., in impleader, cross-claim situations. See United States Lines Co. v. Williams, 5 Cir., 1966, 365 F.2d 332, 336 n. 11, 1966 A.M.C. 2418, 2424 n. 11.

[6] 41 Am.Jur.2d *Indemnity* § 5 at 691 (1968).

> "Federal case law is controlling as to the right of the Federal Government to indemnification under an indemnity contract into which it has entered, and such a contract is not repugnant to the Federal Tort Claims Act or contrary to public policy."

first and certainly one of the leading cases in this area is *Clearfield Trust Co.* v. *United States*, 1943, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838. There the Court held that "[t]he application of state law * * * would subject the rights and duties of the United States to exceptional uncertainty." 318 U.S. at 367, 63 S.Ct. at ——, 87 L.Ed. at ——. There is obviously a need for uniformity in results relative to claims presented by the United States to the Federal Courts for solution.[7] As the discussion on the ultimate merits reveals, there is more than enough difficulty in trying to synthesize a rule that could safely be followed by a multi-state corporate business enterprise in determining the construction and enforceability of indemnity contracts without imposing the same uncertainty and burden on the national sovereign in its undertaking to have contractors perform essential work within its wide sphere of governmental responsibilities. Anything having such a direct touch upon the national treasury should likewise be resolved on standards having like national uniformity. But to conclude that it is Federal law, not State (South Carolina) law, that governs, is no solution. It merely states the problem for there is no clearly defined Federal law, which means that with divergent views in the 50 states, we must make the choice.

At the outset the Government seeks to escape from the necessity of any choice and certainly the prospect of our adopting, as a Federal rule, the majority rule.

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[7] *Cf.* Petty v. Tennessee-Missouri Bridge Comm'n, 1959, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804; United States v. Jones, 9 Cir., 1949, 176 F.2d 278. *See* Free v. Bland, 1962, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180; Royal Indemnity Co. v. United States, 1941, 313 U.S. 289, 61 S.Ct. 995, 85 L.Ed. 1361; Security Life & Accident Ins. Co. v. United States, 5 Cir., 1966, 357 F.2d 145.

It does this by asserting that its agreement with Contractor is not one for indemnity at all, whether indemnity based upon the Government's negligence as indemnitee or the indemnitor-Contractor's negligence, or a mixture of both. It insists that the engagement is a simple but direct one of putting responsibility on Contractor for all damages to property or persons, although its manner of statement and the absence of the classic terminology of indemnity might well have a bearing upon how it is to be construed and applied. We think this is a much too literal, unrealistic approach. If the Government is right on the construction of it, then in its operative effect it will afford to the Government all of the advantages of an indemnity and will impose on Contractor all of the correlative disadvantages. Thus the stage is set for a determination of the significance negligence on the part of the indemnitee should have. For a while this case suffers from all of the uncertainties of a swift and unilluminating disposition on bare bones pleadings.[8]

The very assertion of the case by the Government inevitably casts it in the role of a negligent actor. The Government's claim against Contractor rests on the

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[8] As we recently said in Barber v. M/V Blue Cat, 5 Cir., 1967, 372 F.2d 626, "at this day and time dismissal of a claim —landbased, waterborne, amphibious, equitable, legal, maritime, or an ambiguous, amphibious, mixture of them all—on the basis of the barebone pleadings is a precarious one with a high mortality rate." *Id.* at 627. The test for a dismissal without a fact finding, articulated in Conley v. Gibson, 1957, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80, is "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46, 78 S.Ct. at 102, 2 L.Ed.2d at ——. This brings us to the asserted facts of the claim and the terms of the contract.

fact that it has had to pay substantial sums to Claimant and this was the direct result of a finding of negligence on its part. Its allegation that Contractor was negligent and that this negligence of the Contractor, not that of the Government, was the real proximate cause of Claimant's injuries does not save the day. It simply precipitates the problem of whether this contract (see note 2, *supra*) imposes on Contractor the burden of absorbing all of the loss brought about by active negligence of the indemnitee if, in some appreciable way, negligence even though slight, of the indemnitor contributed to the damage.

That question is essentially one of contract construction, but a construction viewed from the standpoint of the parties, their relative freedom of action and real bargaining strength and the principles of construction imposed by the pertinent law (State or Federal) concerning the liberality or strictness with which such agreements are to be read. For we would certainly not consider for a moment in fashioning Federal law, that a contract to indemnify one against the consequences of the indemnitee's own negligence is contrary to public policy and thus void altogether, even though there is some division among the courts.[9]

In approaching this as a question of law, really choice of law, governing Federal contracts and con-

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[9] Some jurisdictions hold such a contract void ab initio as against public policy. Woodbury v. Post, 19—, 158 Mass. 140, 33 N.E. 86; Sternman v. Metropolitan Life Ins. Co., 19—, 170 N.Y. 13, 62 N.E. 763. Other courts hold that such contracts are not void, cf. National Surety Corp. v. Rauscher, Pierce Co., 5 Cir., 1966, 369 F.2d 572, 577.41 Am.Jur.2d *Indemnity* § 9, at 694 (1968): "[I]t is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence provided the indemnity against such negligence is made unequivocally clear in the contract."

tractual relationships with governmental contractors, we think everything points toward the desirability of seeking not only a uniformity for the national sovereign but doing that in a way which will more or less simultaneously effect a uniformity with local law. The easiest way to achieve that is to declare that the Federal interest will best be served by choosing the majority rule. Of course, to choose the law is not to eliminate uncertainty or difficulty or the possibility of variable results. But it will lay a standard concerning the approach which the reviewing court is to have and those principles which the court may properly regard to be the performance of acceptable judicial functions and prerogatives.

The majority rule has been variously stated. 41 Am. Jur. 2d § 15, at 701 (1968): "[A]n overwhelming majority of jurisdictions adhere to the general rule requiring an unequivocal expression of intent before allowing indemnity for the indemnitee's own negligence * * *."

Although this court in *Jacksonville Terminal*[10] re-

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[10] Jacksonville Terminal Co. v. Railway Express Agency, Inc., 5 Cir., 1962, 296 F.2d 256, *cert. denied*, 369 U.S. 860, 82 S.Ct. 949, 8 L.Ed.2d 18. However, *Jacksonville* which spoke for Florida only now apparently is but an historical marker for it now joins the many other cases where the highest state courts within the Fifth Circuit have declined to follow our *Erie* judgments. W.S. Ranch Co. v. Kaiser Steel Corp., 10 Cir., 1967, 388 F.2d 257, 264-65 n. 11-14, *reversed*, 1968, —— U.S. ——, 88 S.Ct. ——, 20 L.Ed.2d 835.

In Gulf Oil Corp. v. Atlantic Coast Line R.R., Fla. Dist. Ct. App., 1967, 196 So. 2d 456, *cert. denied*, Fla., 1967, 201 So. 2d 893, the Florida District Court of Appeal expressly declined to follow *Jacksonville* stating that there were strong indications since *Jacksonville* that Florida Courts would adopt the majority rule. After analyzing *Jacksonville*, the Florida cases, and rejecting it and the idea that a clause reading essentially the same as that in *Jacksonville* was adequate, the

jected the "majority rule" for Florida because it "rests on an unsound and dangerous foundation" 296 F.2d 256, 262, and because "the majority rule presumes that courts have the power to alleviate or eliminate this burden by construing the indemnity agreement in a manner which is patently inconsistent with

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Gulf Court concluded: "It is evident, then, that Florida decisions hold that an indemnity agreement which indemnifies against the indemnitee's own negligence must state this in 'clear and unequivocal' language."

"* * * there must be language *specifically* designating indemnification against one's own negligence." 196 So. 2d at 459. (Emphasis in original).

This authoritative choice by a Florida Court of Appeal bears the stamp of approval evidenced by the denial of certiorari by the Florida Supreme Court. Unlike the equivocal counterpart in the Federal system, denial of certiorari stands for much in Florida. As we said in Miami Parts & Spring, Inc. v. Champion Spark Plug Co., 5 Cir., 1966, 364 F.2d 957, 965-66, n. 7, quoting Hunter v. Tyner, Fla., 1942, 10 So. 2d 492: "A writ of [certiorari] being simply a method of procedure by which such appeals authorized by the statute can be brought to this Court, its denial, we think, was an adjudication of the propriety of the order involved and it could not again be questioned in this appeal."

We went on, quoting Advertects, Inc. v. Sawyer Indus., Fla., 1953, 64 So. 2d 300: "The order appointing the receiver was reviewed by this Court on a petition for writ of certiorari and this Court affirmed the order of the chancellor by denying the petition for writ of certiorari." 364 F.2d at 966.

We are not unmindful of a later Florida Appellate decision purporting to adopt the minority rule, Thomas Awning & Tent Co. v. Toby's Twelfth Cafeteria, Inc., Fla. Dist. Ct. App., 1967, 204 So. 2d 756, where one Judge dissented on the basis of *Gulf, supra.* However, by direct communication with the Clerk of the Florida Supreme Court we are advised that certiorari was not applied for in that case. It is therefore our *Erie* judgment that the majority rule adopted for Florida in *Gulf, supra,* stands as the latest authoritative pronouncement of Florida Law.

the plain and clear meaning of the language employed by the contracting parties" and thus constitutes "a dangerous and unwarranted extension of the judicial function" 296 F.2d 256, 262, it recognized that the so-called majority rule had been fairly stated in *Batson-Cook*.[11] We described the process of contract construction in *Batson-Cook* this way, "[I]n this process, it is the law which steps in and tells the parties that while it need not be done in any particular language or form, unless the intention is unequivocally expressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence. The question then is: does the specific contract in dispute clearly reflect such a purpose?" 257 F.2d at 412.[12]

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[11] Batson-Cook Co. v. Industrial Steel Erectors, 5 Cir., 1958, 257 F.2d 410. American Ag. Chem. Co. v. Tampa Armature Works, 5 Cir., 1963, 315 F.2d 856 (concurring opinion). This was, of course, an *Erie* declaration for Alabama which may have been superseded by the Alabama Supreme Court in Republic Steel Corp. v. Payne, Ala., 1961, 132 So.2d 581, 586.

[12] In footnote 3 of *Batson-Cook* we were at pains to list the number of cases from this Court echoing this accepted principle and finding now an agreement which did cover the indemnitee's negligence and others holding to the contrary, depending upon the wording, setting, and other guides toward divination of the so-called intent of the parties.

We undertook also, to make quite plain that the contract need not contain the talismanic words "even though caused, occasioned, or contributed to by the negligence, sole or concurrent of the indemnitee," or like expressions. 257 F.2d at 412.

Although the District of Columbia Circuit accepts the majority rule's requirement that the intention to indemnify against the indemnitee's negligence must clearly appear, Moses-Ecco Co. v. Roscoe-Ajax Corp., D.C. Cir., 1963, 320 F.2d 685, 687 citing *Batson-Cook*, at 688 n.2 it properly declined to follow it if it was read to require the presence of the talismanic words.

Of course, to state the rule which is a guide to the court's approach hardly determines the case. Indeed, the travail just begins. Except where the words are identical, little is to be gained by comparing this case with that, or matching this phraseology against another. Indeed, the same words frequently receive contradictory constructions at the hands of the highest appellate courts separated only by the imaginary boundary line of contiguous states. The "intention" of the parties is frequently more the statement of a result than a statement of a reason why. So much is wrapped up in the policy considerations which this or that jurisdiction considers within the proper scope of the judicial function or of critical relevance. See *American Ag. Chem. Co.* v. *Tampa Armature Works*, *supra* (concurring opinion). Added to this is the fact that for every similarity there is a dissimilarity. It begins and ends then as a matter of the law, that is, through the judicial function, construing the contract. That depends on that contract.

When we zero in on this particular contract (see note 2, *supra*) from the standpoint of the position of the parties at the time the contract was made,[13] we find no sign pointing unequivocally to a purpose on the part of a small subcontractor performing some integral part of a Government contract to take upon its shoulders the unlimited obligation either in terms of dollars or events precipitating damage to others when caused primarily by the active direct negligence of the

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[13] When dealing with the construction of a contract, the court must place itself in the place of the parties and determine their mutual intent. J. M. Huber Corp. v. Denman, 5 Cir., 1966, 367 F.2d 104; American Oil Co. v. Hart, 5 Cir., 1966, 356 F.2d 657; American Ag. Chem. Co. v. Tampa Armature Works, Inc., 5 Cir., 1963, 315 F.2d 856. *Cf.* Indemnity Ins. Co. v. DuPont, 5 Cir., 1961, 292 F.2d 569; Fidelity-Phenix Fire Ins. Co. v. Farm Air Service, Inc., 5 Cir., 1958, 255 F.2d 658.

Government simply because in the judicial scales some slight dereliction of the Contractor occurred which, among joint tort feasors the law would recognize. The very nature of the National Government argues against any but the largest of industrial enterprises as Governmental contractors, rationally undertaking such far-flung burdens. There is first the very size, the immensity, of Government. This is complicated more frequently as a matter of necessity, by security considerations which close to the private contractor any access to information, sometimes of the most rudimentary kind, by which a contractor could ascertain whether it was reasonably safe to rely upon the expectation that the Government would do its part to minimize risks in today's complex, frequently hazardous, Governmental contract operations. Of course, this is not to make the contract in terms here employed superfluous at all. The Contractor bears full responsibility for damage occasioned by his negligence alone or his negligence in connection with other contractors or subcontractors [14] or members of the public, excluding only the Government as indemnitee.[15] It also supplies a procedural device to assure effective legal recourse by the negligence-free Government against the negligent Contractor.[16] The argument sometimes

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[14] Cf. Travelers Ins. Co. v. Busy Elec. Co., 5 Cir., 1961, 294 F.2d 139; Halliburton v. Norton Drilling Co., 5 Cir., 1962, 302 F.2d 431.

[15] 41 Am.Jur.2d *Indemnity* § 16, at 703 (1968):

> "Where the injury was caused by the concurrent negligence of the indemnitor and the indemnitee, the courts have frequently read into contracts of indemnity exceptions for injuries caused in part by the indemnitee, although there is authority to the contrary."

[16] See, e.g., American Ag. Chem. Co. v. Tampa Armature Works, 5 Cir., 1963, 315 F.2d 856, 861 n.3 (concurring opinion).

made, that contracts of this kind must be read to include the indemnitee's negligence, for otherwise there would be no occasion to demand hold-harmless indemnity, is extremely superficial. With stakes so high today, parties frequently pay out substantial, huge sums of money in settlement, frequently with the acquiescence and approval of the indemnitor, reserving questions vis-a-vis themselves for later determination. See, e.g., *James F. O'Neil Co.* v. *United States Fidelity & Guaranty Co.*, 5 Cir., 1967, 381 F.2d 783.

For these reasons the Government fails on its contract construction theory. But the Government, as do all other parties today, when everything else fails, falls back on the Tinker-to-Evers-to-Chance multiple impleaders in the *Sieracki-Ryan-Yaka* situations of indemnity based upon breach of the WWLP—the breach of the warranty or workmanlike performance.[17] So far this court has kept this newly formed concept strictly confined to salt water or at least amphibious applications.[18]

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[17] D/S Ove Skou v. Hebert, 5 Cir., 1966, 365 F.2d 341, 1966 A.M.C. 2223; United States Lines v. Williams, 5 Cir., 1966, 365 F.2d 332, 1966 A.M.C. 2418.

[18] See Halliburton v. Norton Drilling Co., 5 Cir., 1962, 302 F.2d 431, 436.

The United States urges for the resolution of this case the adoption of the implied-indemnity theory of Ryan Stevedoring Co. v. Pan-Atlantic Steamship Co., 1956, 350 U.S. 124, 78 S.Ct. 232, 100 L.Ed. 133, which allowed indemnity to the shipowner from the stevedore because the stevedore "breached his duty to do the job safely" and his failure to do so gives rise to a cause of action in implied indemnity. This principle of law is indeed Federal in nature, but it is not the appropriate one for the resolution of this case. This Court in Halliburton v. Norton Drilling Co., 5 Cir., 1962, 302 F.2d 431, 436, declined to apply Ryan. In fact, this Court held in Koninklyke v. Strachan Shipping Co., 5 Cir., 1962, 301 F.2d 741, that "the ex-

The Government has been found guilty of active negligence proximately causing substantial injuries to the Claimant. Contractor, even though guilty of some concurring negligence, has no obligation under this contract to indemnify the Government against the consequences of the Government's neglect.

AFFIRMED.

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press indemnity agreement may have waived any possible implied one." In Centraal Strikstof Verkoopkanter v. Walsh Stevedoring Co., 5 Cir., 1967, 380 F.2d 523, this Court held that "[t]he implied warranty established in Ryan is a product of the admiralty courts and a creature of the admiralty law * * *. The cases in which the doctrine has been applied have been admiralty cases which presented substantially similar circumstances to those existing in *Ryan*." Id. at 529.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1966

No. 23432

D. C. Docket No. 1647—Civil Action

UNITED STATES OF AMERICA, APPELLANT

versus

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY
APPELLEE

Appeal from the United States District Court
for the Southern District of Georgia

Before BROWN, Chief Judge, GOLDBERG and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, United States of America, be condemned to pay

the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 28, 1969

Issued as Mandate: March 26, 1969.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
Savannah Division

Civil Action No. 1647

UNITED STATES OF AMERICA

vs.

M. O. SECKINGER, JR. t/a M. O. SECKINGER COMPANY

ORDER OF COURT

Defendant having filed a Motion to Dismiss plaintiff's claim of indemnity on several grounds, the indemnification clause of the contract must be reviewed.

> "He (defendant) shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work." (Page 3—Contract between plaintiff and defendant) (Parenthesis added)

Previously, the plaintiff had been adjudged negligent under a similar set of facts by the United States District Court, Eastern District, South Carolina. (AC-183) Under Order of that court it has paid to one Branham the sum of Forty-five Thousand ($45,000.00) Dollars because of its negligence on the job which plaintiff worked as a subcontractor.

The plaintiff now seeks recovery of this amount from the defendant based on the indemnification as aforestated.

It seems that plaintiff cannot succeed for several reasons.

First, in AC-183 the government attempted to involve the defendant by impleading him as a third party defendant. The court entered an Order stating

that the controversy between the United States and Seckinger should not be resolved at that time and dismissed the plaintiff's third party complaint.

The plaintiff having thus failed to implead the defendant is now seeking to do the same thing. It does not seem that they have this right. Certainly, an appeal should have been filed on the previous Order of Judge Timmerman if the plaintiff intended to prosecute their claim against Seckinger.

Moreover, the court finds that the language of the contract as alleged is not broad enough either expressly or impliedly to indemnify the government from its own negligence. Certainly, this court is bound by the fact that the government was negligent and adjudged so. As a result, the instant claim seeks indemnification from the plaintiff's own negligence. Plaintiff was in an ideal position to write more into its contract if it actually intended indemnification from its own negligence. Such a broad save harmless agreement is commonplace but none appears in the contract under consideration.

Other arguments are advanced by defendant. He strenuously maintains that he has paid his obligation for any injury to Branham, his employee, by way of compliance with the Workmens Compensation law. He also maintains there can be no contribution between joint tort feasors. He also maintains that plaintiff is attempting to go behind the South Carolina judgment in order to maintain its position. While these arguments appear meritorious, sufficient grounds to sustain the Motion have already been stated.

For all the foregoing reasons, the Motion to Dismiss of defendant is hereby granted.

This 11 day of October, 1965.

/s/ F. M. Scarlett
Judge, United States District Court
Southern District of Georgia

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Savannah Division

Civil Action File No. 1647

UNITED STATES OF AMERICA, PLAINTIFF

vs.

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY,
DEFENDANT

This action came on for (hearing) before the Court, Honorable F. M. Scarlett, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged in accordance with Order filed October 12, 1965, that this action be dismissed.

Dated at Savannah, Georgia, this 3rd day of November 3rd, 1965.

EUGENE F. EDWARDS,
Clerk
U. S. District Court,
S. D. Georgia

By: /s/ Louis E. Aenchbacher
LOUIS E. AENCHBACHER
Chief Dep. Clerk of Court

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 357756 43

FILED
AUG 18 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 395

UNITED STATES OF AMERICA,
Petitioner,

versus

M. O. SECKINGER, JR., t/a M. O. SECKINGER CO.
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No. 395

UNITED STATES OF AMERICA,
Petitioner,

versus

M. O. SECKINGER, JR.,
t/a M. O. SECKINGER COMPANY
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

A more fair statement of the question would be "Can the United States convert a general responsibility clause into one serving to indemnify?"

STATEMENT OF FACTS

The government's Statement of Facts is generally correct but borrows heavily from non-record matter. There is nothing in our record for example that tells how Bradham was burned, or how much electricity was in the exposed government wire, or whether he

was helping a fellow employee. Our record is clear, however, that there was governmental negligence sufficient for a Federal District Court to award Bradham $45,000.00 from the United States.

The fact statement goes on and attempts to lodge a transcript of the Bradham trial with this court. Whatever transcript lodged was not a part of the record in this case. We cannot pass on its correctness or official nature. Nor have we been served with any transcript to afford the opportunity to review same.

Certainly, if the court chooses to consider this transcript, it should ascertain the official character and consider the entire record.

Moreover, if what Seckinger has is official of the Bradham case (U. S. District Court, Eastern District, South Carolina; AC-183) it indicates on page 160 and following, that the accused foreman did not order Bradham to cross the line; but, in fact, told him not to do it. Whereafter, Bradham ignored the Seckinger foreman and crossed the line anyway, and hit the exposed wire.

These pages also reveal on page 35 that a government employee was present at the time of the injury, and denominated him as a safety inspector.

If Seckinger's pages are correct a reading of the entire record will immediately show why the United States was adjudged negligent.

REASONS FOR DENYING TH E WRIT

The government through able co nsel attempts to magnify the decision complained o and add to its importance. However, it only succe ds in attempting to torture the ordinary and commor lace meaning of a simple responsibility clause. It a cribes a wishful and far reaching interpretation to simple language.

Certainly, in these times where the ocus of this court is required on so many vital and i portant matters, time should not be taken with this ca e.

The alert Department of Justice as commendably pointed out the possible need for a hange in regula- tions. The denial of certiorari wo ld certainly give it the needed impetus to develop a new clause when indemnity is desired and intended.

The much maligned and magnifie ruling of the low- er court simply states that if you w nt someone to in- demnify for your negligence you mu t state this clearly and not disguise it. To require this urt to spend time restating this simple precept of law is both unfair and unwarranted.

Petitioner also presupposes that our U. S. District Courts are inadequate. Certainly, t se able trial judg- es would not grant judgment again the United States if, in fact, some other party wer the cause of the damages. Certainly, the District C urt in South Caro- lina would not have held the go rnment liable for

the payment of $45,000.00 if Seckinger were an obvious culprit or a proximate cause of the injury to Bradham.

Seckinger, of course, is unable to comment on the presence of 200 government indemnity suits. The government, it seems, is in a unique position to document their implication. Seckinger also is unable to comment on the potential liability of Thirty Million Dollars involved in these suits. However, he is informed that if, in order to work on a government project, indemnity for the government's negligence is required, the cost to the government would certainly be greater than Thirty Million dollars in any one year. Any contractor in his right mind would have to add considerable to his bid price in order to cover this practically unlimited liability. At the very least one would tend to offset the other.

The government would be better advised to handle its own negligence and spend the money saved to institute the proper safety precautions which could serve as a model for all industry.

Following the lower court's ruling certainly would not deprive the responsibility clause of any substantial effect. It would continue to be utilized to make the contractor responsible for his own negligence, both in the performance of the contract, the quality of his work, the ability to respond to a judgment, and the other anticipated facets of general and whole responsibility.

The only effect stricken by the Fifth Circuit is a wishful claim of indemnity. The lower court's reading of the clause does not deny it of practical meaning, but merely recognizes its practical meaning.

The application for certiorari indicates that the government does not necessarily want full indemnity, but might be happy with partial indemnity.

This appears to be an afterthought since the original petition asked for payment in the amount of $45,066.20, the full amount awarded Bradham. (R. 7). This record shows that the government never asked for twenty per cent or forty per cent, but always one hundred per cent of its damages.

At this late date the government changes its course and states that it "seeks only to enforce the specific agreement in the contract."

The specific agreement said nothing to the effect that Seckinger would pay the government for all or a part of the government's negligence.

Petitioner's criticism of Workmen's Compensation laws would certainly come as a surprise to those early sponsors of such laws. These laws recognize the inadequacy of the negligence laws and set forth an award for injury. They are not merely an insulation, but a well deserved protection for the worker and his family. Naturally, they do not allow double recovery.

The assumption also that Seckinger was in such a good position to control the government's negligence also is fallacious. A visit to any government installation or base will dispel the theory that a sub-contractor can tell the governmental agency how to control the specific area in which he must operate. The opposite appears to be true and that is the contractor must assume the risk and work under the prescribed conditions on government installations.

How else could the base perform its function?

Moreover, if the Workmen's Compensation laws unfairly insulate a contractor, this can be countered by a clear indemnity clause in any one of the popular methods.

The government attaches improper meaning to the Jacksonville Terminal case. See *Jacksonville Terminal Company v. Railway Express Agency, Inc.*, 296 Fed. 2d 256 (CCA 5, 1962). The so-called indemnity clause in that case used the words "fully indemnify" and "save harmless," clearly words of indemnity intent. It contained a real indemnity clause and not a puny responsibility clause. Moreover, the contract called for a complete taking over of the terminal property. It was not merely to go onto the property to fix the plumbing.

The foregoing merely supplements and reinforces the excellent decision of the Fifth Circuit. The decision stands well on its own bottom.

This unanimous opinion is certainly valid and sound. Most of petitioner's argument for certiorari at this point is a reiteration of that offered and considered in the lower court. The decision gave careful consideration to the cause involved, and applied Federal law. It overturned one line of reasoning in the District Court, but continued to give stress to the clear meaning of the responsibility clause. It correctly applied the majority rule to the simple language of the simple responsibility clause. It considered squarely the fact that the government wanted all of their damages from the contractor, Seckinger. It correctly decided the case.

So, the certiorari should be denied. The lower court gave a fair construction to plain language. It recognizes that the government could easily have been indemnified if it wanted to. All it had to do was write in an indemnity clause, either partial or total.

In this light, it seems important, in these times, that our body of law must adhere to basic standards that allow citizens to assess risk based on plain language. Such is necessary for our economy. How else can a man bid on a job intelligently and profitably?

Here, Seckinger is a small businessman. Some say he is the backbone of this country. He works hard, stays up nights and puts in his bid. He bids on the basis of the clear intention of the clause.

He seems abundantly entitled to protection. How can the government come before this tribunal some thir-

teen years after the performance of its contract and try to make a sleeper out of this clause?

The lower court has put it in its proper perspective and interpreted it as meaning exactly what it says.

The government, despite its vast and skillful legal apparatus, can only get what it paid for.

If it desires to be indemnified for its own negligence, either wholly or partially, why can't it write this plainly in the contract? Certainly, they have splendid draftsmen available. Certainly, they can exclude any risk they desire to exclude.

There are countless ways to write a pure indemnity agreement. "Hold harmless", "indemnify the United States from any and all losses", including the second party's own negligence, or that of its agent", are just a few of the many.

Whatever the reason might be, the government did not in the contract with Seckinger state that Seckinger should be responsible for the government's negligence and indemnify it therefor. Having failed to do so, they cannot create the intention in the contract by their vast legal apparatus and unlimited fiscal resources.

If petitioner had put a real indemnity clause in initially, Seckinger could have handled the job differently. He would have had to bid higher. He might have provided additional employees to make sure that the gov-

ernment's negligence was caught before it did any damage.

Look again at the language.

What does "responsible" mean anyway?

The 6th Circuit states that to be responsible is to be answerable to the discharge of a duty or obligation. Responsibility includes judgment, skill, ability, capacity and integrity, and is implied by power. *Ohio Power Company, v. N. L. R. B.*, 176 Fed. 2d 385, 387 (CCA 6, 1949).

A Virginia court states that responsible means legally answerable or accountable for discharge of the duty. *Manassas Park Development Co. v. Offutt*, 203 Va. 382, 124 S. E. 2d. 29 (1962).

A Circuit Court has held that the word responsible is far from being broad enough to make the party, that has agreed to be responsible, actually an insuror against all possible contingencies. It was used to mark. the time when the liability should commence. *Fairmont Coal Co. v. Jones & Adams Co.*, 134 Fed. 711, 714 (CCA 7, 1905).

The American College Dictionary states responsible is "answerable or accountable, as for something within one's power, control, or management. Involving accountability or responsibility: a responsible position. Chargeable with being the author, cause or occasion of something. Having a capacity for moral decisions

and therefore accountable; capable of rational thought or action. Able to discharge obligations or pay debts. Reliable in business or other dealings; showing reliability."

Then what could the government and Seckinger have meant by "responsible" in their contract?

Remember, that the government wrote the contract and it must be construed most strongly against them. *Martin v. American Optical*, 184 Fed. 2d. 528 (CCA 5, 1950); See annotation 175 ALR 18, Sec. 8.

What does this construction give us?

Can anyone seriously urge that when Seckinger was signing up his plumbing contract and agreed to be "responsible for all damages to persons or property . . . etc." he meant to take care of whatever the government might be held liable for or even a portion thereof.

"Shall be responsible" is certainly a far cry from "shall indemnify and hold harmless".

How can petitioner be offering a fair interpretation of the language used?

Still another viewpoint sheds light.

The clause deals with damage to "persons".

Did the petitioner pay the $45,000.00 to a "person" under the contract?

Was Bradham such a person as to be covered by the indemnity clause?

We think not.

Bradham was an employe of Seckinger.

He was dealt with amply and liberally under workmen compensation provisions of the contract. Isn't it a strained construction to say that this applied to an employe also?

Why would he be dealt with in one section so liberally and again dealt with in another section?

How could the parties have intended this?

To further back off and take a long commonsense look at the government's position, we profit from a genuinely objective view.

The government, in effect, is saying that the United States District Court for the Eastern District of South Carolina entered a judgment. No appeal was taken. It now says that the judgment was actually entered against the wrong party since Seckinger was the real culprit.

They say that the real negligent party was Seckinger, yet they stood idly by when the distinguished District Court Judge of South Carolina said they were all wrong. The government naturally had competent defensive trial counsel, who would seize upon the negligence of

another as a real impressive defense. Yet the District Court was unconvinced and awarded a judgment against the government alone for $45,000.00.

If Seckinger was as negligent as the government now says it is, why did they get stuck for all of it?

The controlling negligence of another is an absolute defense.

How can the government stand idly by when such an injustice is done, let it be done, and then many years later attempt to get Seckinger to share the blame by virtue of a narrow contract and possible implications therefrom?

Isn't petitioner actually saying that although they were adjudged negligent, they really were not? Aren't they trying to go behind the judgment of the South Carolina District Court?

If we had been so negligent why not use our negligence as a defense? Why now argue that Seckinger was the real party negligent? Remember, Seckinger had to be negligent to have breached its alleged agreement with the government.

Certainly, the Judge of the District Court in South Carolina would not have awarded $45,000.00 to Bradham if a valid escape had been offered.

Under the Federal Tort Claim Act, United States of America is liable just like a private person would be.

Arnhold v. U. S., 284 Fed. 2d. 326 (CCA 9, 1960) Cert. den. 82 Sup. Ct. 122, 368 U. S. 876, 7 L.Ed 2d 76.

A private person in South Carolina is not liable for someone else's tort. *Tobias v. Carolina Power Co.*, 190 S. C. 181, 2 S.E. 2d. 686. (1939)

Therefore, if we had been so negligent (negligent enough to have breached our contract), the petitioner would have a wonderful defense to the claim of Bradham.

Yet no such defense was apparently offered.

Who ever heard of able government counsel letting a judgment be rendered against the United States when it was actually the tort of an independent contractor.

This is a real knockout punch as a defense.

We have naturally refrained from going too deeply into background law. However, it should be noted that an excellent statement of the condition of the law of indemnity as of 1947 can be found in Annotation in 175 ALR on page 12. The court goes into the matter very deeply and thoroughly.

Also see Vol. 1, *The Forum*, American Bar Negligence Section pub. p. 1 - 30. for a 1965 review of the law.

Also a current analysis of the law of indemnity can be found in 42 CJS, Indemnity Sec. 1 et seq., p. 563

et seq. and in 27 Am. Jur Indemnity Sec. 1 et seq. p. 455.

The government tries another approach and asks for certiorari because the Ryan doctrine was not applied.

Count II. of the government's original petition states that: "12. That having undertaken to perform the contract for the United States of America, the defendant, his agents, servants, and employees were obligated to perform the work properly and safely, and to provide workmanlike service in the performance of said work." (R. 7).

It attempts to show that Seckinger somehow promised to keep the United States Marine Base at Parris Island, S. C. in a seaworthy condition.

Such could not be further from the truth of the matter.

Seckinger was not a stevedore, who of necessity takes over the operation of a ship's loading and seaworthiness. He was merely a sub-contractor going in to do some work on the steam pipes. The government does not say we did our plumbing work improperly. It is not complaining that one of the steam pipes broke. It does not complain that one of our valves exploded. It only complains that one of our employees was injured by its own negligence while performing this work.

Thus, petitioner is not complaining that we breached

the core of our agreement, or that we did not perform our plumbing work properly, but they are going several steps further and saying that in the performance of our agreement we committed a tort by using an employe, and exposing him to the government's negligence; or in the alternative we did not insulate our employee from the government's negligence.

They not only want Seckinger to warrant his plumbing work, but the government wants Seckinger to insure any injury to Seckinger's employee because of the negligence of the government. And this by implication based on a weak responsibility clause.

It goes without saying that if the government were allowed to prevail in this case, they would prevail in almost any case where an employee of a government contractor was injured on government property even where our employee was run over by a negligent government truck while the truck was driving on the job, or even possibly when a negligent Marine misdirected a grenade.

The Ryan doctrine states at its core that the obligation is not a quasi-contractual obligation implied in law, or arising out of a non-contractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.

Thus, if the government were complaining of defective plumbing work, it might well attempt to apply

the Ryan doctrine. However, they make no complaint of the quality of our plumbing work, but merely say that we fail to insulate our employee from the government's own negligence.

This view would certainly strain the Ryan doctrine beyond its normal implication.

The Ryan agreement was a broad contract and encompassed many things including loading and unloading. It was a contract of general seaworthiness. In our case we only did a little plumbing job on a big government base. In short, our contract was not as broad and all-encompassing as the stevedoring contract, but much more narrow and restricted.

A recent Supreme Court expression of the Ryan doctine appears in *Italia Societa v. Oregon Stevedoring Co.*, 376 U. S. 315, 84 Sup. Ct. 748, 11 L. Ed. 2d 732 (1964).

This again was another stevedoring case. The court held: . . ."the stevedore's obligation to perform with reasonable safety extends not only to the stowage and handling of cargo but also to the use of equipment incidental thereto... including defective equipment supplied by the shipowner...and that the shipowner's negligence is not fatal to recovery against the stevedore."

Even here, the case was limited by an excellent dissenting opinion by Mr. Justice Black, who sounds a warning and states in part: ". . . the Court here

expands the general law of warranty in a way which I fear will cause us regret in future cases in other areas of the law as well as in admiralty. There is no basis in past decisions of this or any other court for the holding that one who undertakes to do a job for another and is not negligent in any respect nevertheless has an insurer's absolute liability to indemnify for liability to insured workers which the party who hired the job done may incur."

Here again our distinction would apply.

We are not dealing with an all-encompassing service contract which agreed to furnish all plumbing for the government installation on which the work was done. We are dealing only with a narrow contract to install a relatively small amount of outside plumbing in accordance with certain plans and specifications.

Certainly, any service contract such as the contract of a stevedoring firm implies many obligations far beyond that of a plumber doing a specified job.

The stevedore takes over the ship and its ingredients of seaworthiness for a time.

The plumber, Seckinger, hardly had command of the petitioner's Parris Island Marine Depot for even a short time.

What if they had tried to take over even the electrical system of petitioner? Seckinger would have probably been thrown in the brig.

What could be more important to a ship to have the cargo continue its seaworthiness? Improper loading will cause improper ballast, and untold risk.

This is why stevedoring is so expensive. You pay the price to have your cargo loaded right so you won't turn over or break up in the middle of the ocean.

However, such a conclusion could not be applied to our situation.

Yet the Government seizes an old stevedoring case and attempts to apply it. *American Stevedores v. Porello,* 67 Sup. Ct. 847, 330 U. S. 446, 91 L.Ed. 1011 (1947).

In considering Porello, it should be remembered that this was another general stevedoring contract. As a stevedore, American was responsible for the general seaworthiness of the ship. American did not go on to fix the plumbing, but went on to take over the general loading and seaworthiness of the vessel.

Moreover, the wording of the contract was much more general, and was considered by an admiralty court. Such is not anywhere nearly present in our case.

Next, Porello was decided well prior to the Ryan case, and should be read in the light thereof. The case was a libel in admiralty which has different features. For one example, Admiralty basically allows contribution between joint tort feasors as a substantive matter.

Further, the specific clause itself, supposedly one

of indemnity, was much broader than our clause and the Court was faced with a lower court determination that both stevedore and the United States were negligent.

We, therefore, feel that Porello is clearly distinguishable. Moreover, it is hardly a case which encourages the grant of certiorari here.

CONCLUSION

For all of the foregoing reasons, this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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STATE OF GEORGIA)
)
CHATHAM COUNTY)

AFFIDAVIT

Service of the foregoing Brief has been made as required by depositing sufficient copies thereof, properly stamped for air mail postage, and properly addressed to opposing counsel of record.

This ____ day of August, 1969.

Frank S. Cheatham, Jr.,
attorney for M. O. Seckinger,
Jr., t/a M. O. Seckinger
Company

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 395

UNITED STATES OF AMERICA, PETITIONER

v.

M. O. SECKINGER, JR., T/A M. O. SECKINGER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (App. 12) is reported at 408 F. 2d 146. The order of the district court dismissing the government's complaint (App. 9) is unreported.

JURISDICTION

The judgment of the court of appeals (App. 23) was entered on February 28, 1969. By order entered on May 27, 1969, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including July 28, 1969. The petition was filed on July 28, 1969, and was granted on October 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether negligence attributable to the United States precludes it from obtaining indemnification from a negligent government contractor under a standard form contractual indemnity provision which makes the contractor "responsible for all damages to persons or property that occur as a result of his fault or negligence."

REGULATORY PROVISIONS INVOLVED

Title 44 of the Code of Federal Regulations (1949 ed.), as amended to January 1, 1957 (1957 Cum. Supp.), provided in relevant part:

> SEC. 54.1. *Forms to be used.* Except as otherwise authorized, the following standard forms shall be used without deviation by all Executive agencies for or in connection with every formal contract of the kinds specified that may be entered into by them:
>
> * * * * *
>
> (c) *Construction contracts.* (1) U.S. Standard Form No. 23–Rev., approved by the Secretary of the Treasury, Revised April 3, 1942—for fixed-price contracts for the construction or repair of public buildings or works.
>
> * * * * *
>
> SEC. 54.13. *Construction contract.* U.S. Standard Form No. 23—Rev.
>
> * * * * *
>
> ART. 10. *Permits and responsibility for work.* The contractor shall * * * be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work * * *.

The regulations presently in force are essentially similar. See 41 C.F.R. (1969 rev.) 1–16.401, 1–16.402, 1–16.404, 1–16.901–23A Art. 12.

The standard form incorporated in the contract in question in this case is set forth in full in Appendix A, pp. 27–43, *infra*.

STATEMENT

This case arises out of a 1956 accident which injured one of respondent Seckinger's employees, one Branham, while he was working at the Paris Island Marine Depot in South Carolina under a contract between Seckinger and the government. Branham, a steamfitter, walked across the steam pipe he was installing on an overpass to assist a fellow employee; in so doing, he came against a live, uninsulated electric wire carrying 2400 volts of electricity, and was burned and thrown to the ground by the resulting shock. Branham received Workmen's Compensation payments from the South Carolina authorities (App. 7, 10), and then sued the United States in the United States District Court for the Eastern District of South Carolina under the Federal Tort Claims Act, 28 U.S.C. 2671, *et seq.*, claiming that it had been negligent in failing both to deenergize or insulate the wire near the work site and to warn the workers of the dangers involved.

The United States sought to implead Seckinger as a third party defendant at that time, alleging that Branham's injuries were caused by Seckinger's negligence and seeking indemnification for any government liability under the standard contract clause providing that the contractor (Seckinger)

> shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work [App. 4, 9].

On Seckinger's motion, however, the trial judge dismissed the third-party complaint without prejudice, finding that the controversy it presented "should not be resolved at this time and further that its inclusion in the trial of [Branham's complaint] would unnecessarily and improperly complicate the issues [raised herein]" (App. 4). Thereafter, in the summer of 1961, the district court found the government to have been negligent and awarded Branham judgment for $45,000 and costs, which the government has paid (App. 4).

In September, 1964, the United States instituted the present action against Seckinger in the United States District Court for the Southern District of Georgia. The complaint was in two counts. The first count was based upon the contractual indemnity provision quoted above, alleging facts constituting proximately causal negligence on Seckinger's part: failure to request that the lines be deenergized or insulated; failure to provide safety insulation; permitting, even directing, Branham to work near the live wires;[1] and failure to prevent him from proceeding in a dangerous manner (App. 3–5). The second count alleged the same facts, adding that "having undertaken to per-

[1] At the trial of Branham's action, he testified that his foreman, a Seckinger employee, had ordered him to make the crossing that led to his injury. (See pp. 34–38 of the transcript of that action, which has been lodged with the Clerk.)

form the contract * * * the defendant * * * [was] obligated to perform the work properly and safely and to provide workmanlike service * * *" (App. 5), which it had failed to do. Seckinger moved to dismiss the complaint, and the district court did so. In its brief opinion, it reasoned (1) that the government should have appealed the dismissal of its third-party complaint in Branham's action, and was foreclosed from initiating independent proceedings against Seckinger; and (2) that the contract clause did not permit indemnification of the government for its own negligence and—government negligence having been found in Branham's action—such indemnification was necessarily sought in this suit (App. 9–10).

On appeal, the United States Court of Appeals for the Fifth Circuit rejected the district court's first ground of decision, noting that in dismissing the third-party complaint the trial judge had specifically invited the present suit (App. 14–15). It agreed, however, with the district court's second ground of decision. The court reasoned that since the government had been found negligent in the prior action, any indemnification it might obtain would necessarily be indemnification for its own negligence. Upon concluding that the question whether such indemnification would be proper under a government contract was a matter of federal rather than state common law, the court adopted as the federal rule the "majority rule" among the states—that indemnification for an indemnitee's own negligence will be allowed only if there is an "unequivocal expression of intent" to that effect in the contract. Finding no such statement in the con-

tract here, the court concluded that the government is not entitled to any indemnification from Seckinger (App. 20–22).

ARGUMENT

INTRODUCTION AND SUMMARY

The respondent Seckinger bound himself to accept responsibility for "*all* damages that occur as a result of *his* fault or negligence" in the performance of his fixed-price government construction contract.[2] [Emphasis supplied.] One of Seckinger's employees was injured on the job and recovered damages from the government on the ground that the government had been negligent. Having been frustrated in its attempt to implead Seckinger in that action, the government instituted the separate action below; the complaint, like the rejected third-party complaint, asserted the government's right under the responsibility clause to recover over against Seckinger because the injury to the employee had been caused by Seckinger's negligence.

[2] Such a clause has been required in all fixed-price construction contracts at least since 1938. 41 C.F.R. (1938 ed.) 11.1, 11.3, 12.23 Art. 10; 41 C.F.R. (1943 Cum. Supp.) 11.4(c), 12.23 Art. 10; 41 C.F.R. (1949 ed.) 4.1(c), 4.13 Art. 10; 44 C.F.R. (1957 Cum. Supp.) 54.1(c), 54.13 Art. 10; 41 C.F.R. (1961 rev.) 1–16.401, 1–16.402, 1–16.404, 1–16.901–23A Art. 11; 41 C.F.R. (1969 rev.) 1–16.401, 1–16.402, 1–16.404, 1–16.901–23A Art. 12. See also Armed Services Procurement Regulation 7–602.13, 32 C.F.R. (1969 rev.) 7.602–13. This same clause was required by the Federal Works Agency (Bureau of Community Facilities), BCF Form 657, Art. 28; FWA Form W–254, Art. 30 (revised December 3, 1942); Form SE–103, Art. 20. The War Department also employed a similar contractual provision, W. D. Contract Form No. 2, Art. 10 (8–13–43), found in Procurement Regulation No. 13, p. 1309 (¶ 1302.10), Art. 10.

The court of appeals erred in holding that Seckinger's undertaking to bear "all damages" caused by "his fault or negligence" gave him no responsibility to the government in any situation where both were negligent. It read into federal contract law, and applied here, the sweeping maxim that indemnification for an indemnitee's own negligence will be allowed only if there is an unequivocal expression of intent to require such indemnification in the contract. But this maxim is inapplicable where the indemnitor as well as the indemnitee has been negligent. Courts might be understandably reluctant to allow a negligent indemnitee to recover from a faultless indemnitor who has not expressly undertaken such liability, but there is nothing extraordinary about an agreement as to who shall bear the risk of damage awards in situations where both contracting parties are negligent. Thus there is no reason for restrictive interpretation of this responsibility clause.

Indeed, the realities of the situation suggest that an obligation of indemnification was intended and should be enforced. The government hired Seckinger to perform construction work on its property, and Seckinger was best able to control safety conditions. Yet absent an indemnity clause, Seckinger would have been insulated from negligence liability to its employees by the state workmen's compensation law, throwing the entire risk of such liability upon the government. The government would be properly concerned to avoid that risk, and at the same time encourage its contractor carefully to supervise working conditions primarily

under his control, by requiring an indemnity agreement.

Similar considerations have led this Court and others to find such contractual obligations even where there is no responsibility clause of any kind, *e.g.*, *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124, and many courts have been less demanding of contractual language of indemnity where the indemnitor as well as the indemnitee was negligent. Certainly if an indemnity obligation may be found in the absence of any agreement on the subject, there is the more reason to allow indemnity where a contractor has agreed to be responsible for "all damages" his negligence causes; the artificial rule of construction adopted by the court below should not be used to read out of this contract what might be found in it even if it were not written there. Apparently recognizing the force of this reasoning, this Court years ago rejected the artificial rule in a case which, although it arose in a maritime context, is in no significant respect different from the case at bar. *Porello* v. *United States*, 330 U.S. 446.

In any event, the responsibility clause here is unequivocal. To read it, as the court below has done, as applying only to situations where there is no government negligence would deprive it of any sensible meaning—for the government can be found liable and consequently will need indemnification only if it is actually negligent. If the language is to be given any meaning at all, the choice cannot be between full indemnification or none, as the court below believed. Rather, that choice must be between full indemnification and

indemnification based on comparative fault—a choice this Court recognized was open in *Porello, supra.* While we believe the government is entitled to full indemnification if it proves what is alleged in the complaint, it is at least entitled to a determination of the portion of the damages that should be assumed by Seckinger.

I. WHERE BOTH PARTIES TO A CONTRACT ARE NEGLIGENT TOWARDS A THIRD PERSON, THERE IS NO OCCASION FOR AN EXTRAORDINARILY RESTRICTIVE INTERPRETATION OF A CONTRACTUAL RESPONSIBILITY CLAUSE

Since the government's complaint seeks indemnification only for damages which occurred as the result of Seckinger's negligence, there is no issue in this case of obliging Seckinger to pay for damages which were not the result of his fault; we do not contend that the contract clause in question covers such a situation. At trial, the government would have to prove both Seckinger's negligence and the proximate relation between that negligence and the damages sought to be recouped; but the allegations in this regard must be assumed in considering the propriety of the dismissal of its complaint.[3]

[3] The fact that the government has been adjudicated negligent (in a proceeding to which Seckinger was not a party) does not foreclose this proof logically or as a matter of law. It is commonplace that there may be more than one negligent actor, and more than one proximate cause of injuries sustained, in any accident involving the behavior of more than one person. See, *e.g., Porello* v. *United States*, 153 F. 2d 605, 607 (C.A. 2), remanded, 330 U.S. 446.

Unaccountably, the court of appeals intimates that the government's negligence in this case was far more substantial

A.

The maxim applied below—that indemnification for an indemnitee's own negligence will be allowed only if expressly and unequivocally provided for in the contract—rests on value judgments which are largely inapplicable to this situation. There is indeed a fairly well established policy of the law to discourage innocent persons from assuming or being burdened with the negligence liabilities of others.[4] *E.g., Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85; *Boston Metals Co.* v. *Winding Gulf*, 349 U.S. 122, 126–127 (Frankfurter, J., concurring). "Courts are understandably reluctant to allow a negligent indemnitee to invoke general language [of indemnification] * * * to recover from a faultless indemnitor." *Associated Engineers, Inc.* v. *Job*, 370 F. 2d 633, 651 (C.A. 8), certiorari denied, 389 U.S. 823. While most courts have not for-

in culpability and effect than respondent's (App. 17, 21, 22). The complaint alleges the exact opposite (App. 4–5). Whether respondent was negligent, and to what degree, and to what extent that negligence caused the injuries for which the United States was made to respond in damages, are, of course, issues which remain for determination at trial.

In this determination the government should not be bound by any factor of res judicata arising out of the Branham trial, since Seckinger was not a party to that case. The government is no more bound by that decision, with respect to Seckinger, than Seckinger is, with respect to the government.

[4] Modern insurance practices have made even this policy a questionable one. The price to the innocent party of comprehensive insurance then appears to be simply one of the costs of the contract. *Jacksonville Terminal Co.* v. *Railway Express Agency, Inc.*, 296 F. 2d 256, 262–263 (C.A. 5), certiorari denied, 369 U.S. 860; *Indemnity Insurance Co. of North America* v. *Koontz-Wagner Electric Co.*, 233 F. 2d 380, 383 (C.A. 7).

bidden such arrangements as a matter of public policy, compare *Bisso, supra,* there is nonetheless the notion that it would be "extraordinary" to impose on an innocent party liability for the negligence of another, and that therefore the "purpose to impose this * * * liability on the Indemnitor must be spelled out in unmistakeable terms." *Batson-Cook Co.* v. *Industrial Steel Erectors,* 257 F. 2d 410, 413 (C.A. 5).

There is, on the other hand, nothing extraordinary about the parties to a contract agreeing between themselves who shall bear the risk of a damage award if both of them are negligent. Where a property owner hires a contractor to perform work for him, it is altogether natural that the contractor should assume full responsibility for the proper conduct of the work even though the property owner might also be liable on more or less technical grounds. And such an allocation of responsibility is especially appropriate as to injuries to the contractor's own employees when, as here, the contractor's liability is limited by a state workmen's compensation scheme and otherwise it is only the property owner who has the risk of full tort liability.

No policy of the law suggests that no matter how negligent a contractor may have been, or to what extent its negligence may have contributed to injuries complained of, the government should be denied any indemnification so long as it too was negligent in some degree. Even in the absence of contractual provisions, an actor guilty of some degree of negligence has been permitted to obtain indemnification from another determined to have been principally at fault. *United Air*

Lines, Inc. v. *Wiener*, 335 F.2d 379, 398–402 (C.A. 9) (reviewing the authorities). Similarly, this Court has held many times that a negligent shipowner may recover indemnity from a negligent stevedoring contractor, even in the absence of an express provision of indemnity in the stevedoring contract. *E.g., Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124; *Weyerhaeuser S.S. Co.* v. *Nacirema Oper. Co.*, 355 U.S. 563; *Crumady* v. *The J. H. Fisser*, 358 U.S. 423. As this Court stated in *Ryan, supra*, at 133–134:

> Competency and safety * * * are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's * * * contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. * * *[5]

A fortiori, there is no sound policy that requires a court to read restrictively a contractor's express

[5] See also *General Electric Co.* v. *Moretz*, 270 F. 2d 780 (C.A. 4), certiorari denied, 361 U.S. 964, where the court relied on *Ryan* to find an indemnity obligation in the contract between a trucking line and a shipper (the truck driver recovered from the shipper on the ground that it had negligently loaded the truck, causing the load to shift). Similar cases are: *San Francisco Unified School Dist.* v. *California Bldg. Maintenance Co.*, 162 Cal. App. 2d 434, 328 P. 2d 785; *Blackford* v. *Sioux City Dressed Pork, Inc.*, 254 Iowa 845, 849–50, 118 N.W. 2d 559; *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E. 2d 567; *Moroni* v. *Intrusion-Prepakt, Inc.*, 24 Ill. App. 2d 534, 540, 165 N.E. 2d 346, 349–50; *Phoenix Bridge Co.* v. *Creem*, 102 App. Div. 354, 92 N.Y.S. 855, affirmed, 185 N.Y. 580, 78 N.E. 1110; *Mayhew* v. *Iowa-Illinois Telephone Co.*, 279 F. Supp. 401, 405–406 (S.D. Iowa).

ndertaking to be responsible for "all damages" aused by his negligence. Thus, courts have frequently een less demanding of contractual language of in-lemnity when the indemnitor also was negligent, even hough the common phrasing of the indemnity maxim loes not distinguish such situations from those where he indemnitor is blameless. Where both parties have een negligent, courts frequently enforce contractual lauses placing the full burden of damage on one arty. See, *e.g.*, *Associated Engineers* v. *Job, supra;* Spurr v. *LaSalle Const. Co.*, 385 F. 2d 322, 330 (C.A.); *Unitec Corp.* v. *Beatty Safway Scaffold Co. of Oregon*, 358 F. 2d 470 (C.A. 9); *Anthony* v. *Louisiana & Ark. R. Co.*, 316 F. 2d 858, 864–866 (C.A. 8); *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F. 2d 02, 911–912 (C.A. 9); *National Transit Co.* v. *Davis*, F. 2d 729 (C.A. 3); *Union Pac. R. Co.* v. *Ross Transfer Co.*, 64 Wash. 2d 486, 488, 392 P. 2d 450, 51; *Newberg Const. Co.* v. *Fischbach*, 46 Ill. App. d 238, 196 N.E. 2d 513.

In the government contract context, it is the con-ractor and not the government which is primarily oncerned with the condition of the worksite, and specially the safety of the contractor's own em-loyees. That is certainly part of the meaning of he contract clause disputed in this case, for it requires he contractor to assume responsibility for "all dam-ge" he causes by "his negligence or fault." Other auses in the standard contract which Seckinger gned require the contractor to have a competent perintendent present "on the work at all times uring progress" (Appendix A, *infra*, p. 36, cl. 10)

and to comply with all pertinent provisions of the Corps of Engineers Safety Manual (32 C.F.R. (1968 ed.) 7.602–42(a)). That Manual requires, *inter alia*, periodic meetings with employees to brief them on safety matters. Moreover, it is the contractor, not the government, which is in direct control of the manner and conditions of work and thus is best situated to prescribe safe industrial practices.[6]

Fairness dictates that the contractor should bear the primary burden of compensation if his employee is injured. Contractors are, however, generally insulated from direct negligence liability to their employees because of state workmen's compensation laws. Only if there is a responsible third party, such as the government was in this case, will the employee have any chance to assert tort liability; then, any concurrent negligence on the third party's part will enable him to recover his entire damages from it, often in substantial amounts.[7] But the third party's liability may

[6] The primacy of the contractor's obligation is also shown by recently passed federal legislation authorizing the Secretary of Labor to promulgate health and safety standards for all federal or federally assisted construction projects, imposing on the employer responsibility for compliance with those standards, and providing sanctions including contract cancellation and ineligibility for further contracts. P.L. 91–54, 91st Cong., 1st Sess., enacted August 9, 1969.

[7] Under the workmen's compensation laws in all states, the worker surrenders all rights and remedies which he would otherwise have against his employer as a result of the injury. *E.g.*, S.C. Code, § 72–121 (1962); Larson, *Workmen's Compensation Law*, Vol. 2, § 65 (p. 135), § 72 (p. 170). At the same time, all of the American compensation systems recognize that the worker may have a common law tort action against a third person whose negligence or wrongful conduct, as here, has been a proximate cause of his injuries. See Larson, *supra*, Vol. 2, § 71

be based only upon a failure to provide the employee a safe place to work or to warn him of a dangerous condition—failures which the contractor could and should have remedied.[8] Compare *Associated Engineers, Inc.* v. *Job, supra.* In such a situation it is un-

(p. 165). There is, however, considerable variation as to who is a "third person".

> In some states the third persons may include everyone except the immediate employer; in others the exclusiveness of the compensation benefits immunizes fellow employees, officers, agents and representatives of the employer; in many a general contractor is immune from liability to the employees of his subcontractor; and in a few one engaged in a common enterprise with the employer out of which the injury arises may be free from tort liability.

A. McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers*, 37 Texas L. Rev. 389, 394 (1959).

[8] Claims made in negligence actions against the government by its contractors' employees are frequently of this character For example, in *Fisher* v. *United States*, 299 F. Supp. 1 (E.D. Pa.), appeal pending, C.A. 3, Nos. 18,151–18,153, the government was held liable for its "negligent" failure to warn an employee of a subcontractor of the danger of walking on spreader boards used by the contractors at the site, because government inspectors were said to know that inexperienced employees were present on the site who would use the boards in imitation of other workmen, but without being warned by them of the dangers involved. In *Yerkes* v. *United States*, No. 68–1198 in the same court, the plaintiff employee was injured when the ladder his employer furnished toppled and he put his hand into a wall fan. In *Terry* v. *United States*, No. 68–C–129, E.D.Ark., the government is being sued for injuries suffered when employer-installed scaffolding collapsed. Countless similar examples of attempts to escape the recovery restrictions imposed by workmen's compensation schemes could be given. Of course, the government can sometimes establish that it was not negligent, and the courts of appeals have refused to find government negligence simply in a failure by the government to exercise contractual rights of safety inspection and enforcement. *United States* v. *Page*, 350 F.2d

fair that the party hiring the contractor should bear the entire burden of tort liability simply because it is the only available defendant; even if there were any such intent in a state's workmen's compensation law, that law could not determine rights between the United States and its contractor. The indemnity obligation not only redresses the unfairness, but also gives the contractor a necessary and desirable incentive to assure safe work methods and conditions for his employees.

In this connection, it may be noted that insurance against such contractual liability is available to the contractor either under a Comprehensive General Policy or other liability policy, or may be obtained in a separate policy. See *Fire, Casualty and Surety Bulletins*, Casualty & Surety Section, Public Liability, pp. B–1 to B–3 (Contractual Liability) [National Underwriters Co., Cincinnati, Ohio, 1966]. Such insurance is recommended by the contractors' trade association,[9] as well as by The American Institute of Architects, whose general form construction contract is in wide use throughout the nation. A contractor must normally insure against liability under workmen's compensation, disability benefit and other similar employee benefit acts, and against personal injury and property damage

28 (C.A. 10), certiorari denied, 382 U.S. 979; *Roberson* v. *United States*, 382 F.2d 714 (C.A. 9); *Wright* v. *United States*, 404 F.2d 244 (C.A. 7). But it is often possible, as it was here, to make out a plausible case of government as well as contractor negligence, and in those circumstances some action over against a negligent contractor is required to protect the government against full liability for the losses involved.

[9] See *Insurance and Bond Checklist* (p. 3) of the Associated General Contractors of America, Inc., Washington, D.C.

claims by persons other than its employees. Therefore, it seems appropriate that a contractor should also insure itself against contractual liability, especially in view of the fact that explicit indemnity arrangements are now standard in the most widely used forms of construction contracts.[10]

B.

This Court has previously refused to apply the artificial rule of construction followed below, in the inter-

[10] For example, the standard form contract of The American Institute of Architects (AIA Document A201, Sept. 1967) contains the following very broad indemnification clause:

4.18 INDEMNIFICATION

4.18.1 The Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (b) is *caused in whole or in part by any negligent act or* omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, *regardless of whether or not it is caused in part by a party indemnified hereunder.* [Emphasis added.]

4.18.2 In any and all claims against the Owner or the Architect or any of their agents or employees by any employee of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Paragraph 4.18 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor or any Subcontractor under workmen's compensation acts, disability benefit acts or other employee benefit acts.

pretation of a maritime contract indistinguishable for present purposes from the contract in this case. In *Porello* v. *United States*, 153 F.2d 605 (C.A. 2), remanded, 330 U.S. 446, applied on remand, 94 F. Supp. 952 (S.D.N.Y.), a stevedoring company had contracted to perform services for a government vessel, and undertook to be responsible "for any and all damage or injury to persons and cargo * * * through the negligence or fault of the Stevedore, his employees and servants." 330 U.S. at 457. One of the company's employees was injured through the concurrent negligence of the company and the government. He sued the government, which in turn claimed and obtained in the court of appeals full indemnification under the quoted provision.

On petition for rehearing and in this Court, the stevedoring company argued for the "majority rule"—the rule applied below in the present case—and claimed that the quoted language did not constitute an unequivocal expression of intent. 153 F.2d at 609; Brief for Petitioner, No. 69, O.T., 1946, 36–41. The court of appeals rejected that argument on the ground that, as "the United States could be liable only if itself at fault * * * [that] construction * * * would make the indemnity provision meaningless." 153 F.2d at 609. This Court passed over the argument and adopted instead the alternative suggestion of petitioner's brief, that the case be remanded for a determination what the intention of the quoted language actually was. Brief for Petitioner, *supra*, at 41–42; 330 U.S. at 457. Obviously that remand is inconsistent with the proposition that the government's indemnifi-

cation rights depended upon an *unequivocal* expression of intent to provide indemnity for government negligence; the Court necessarily determined that they did not.[11]

The relevance of the *Porello* holding to the present case is not blunted by the fact that that contract arose in a maritime context. There are no special maritime considerations—and none are suggested in the *Porello* opinion or briefs—to justify one rule for interpreting maritime contracts of indemnity and another applicable to federal contract cases generally. Indeed, the parties and this Court all agreed that the indemnity feature of the *Porello* contract had no special maritime nature. Brief for Petitioner, pp. 48–52; Brief for the United States, pp. 45–50; 330 U.S. at 456. Admiralty jurisdiction was founded on the maritime nature of the underlying tort, *ibid.*, but the contractual issues and underlying policies are the same. Here, as there, if the language binding the contractor to assume responsibility for "all damages" caused by "his fault or negligence" reflects an intent to indemnify in circumstances where both contracting parties have been negligent, no artificial rule of contract construction should be invoked to defeat that intent.

Moreover, as we have noted previously, this Court has allowed indemnity in situations similar to the

[11] When, on remand, the stevedoring company refused to come forward with any evidence concerning the intent of the clause, the district court ruled that the court of appeals' interpretation therefore remained in effect. The Second Circuit has subsequently reaffirmed its *Porello* holding that a clause so worded requires full indemnification. *A/S J. Ludwig Mowinckels Rederi* v. *Commercial Stevedoring Co.*, 256 F.2d 227, 231.

present one even in the absence of contractual responsibility clauses. *E.g., Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, p. 12, *supra*. In essence, the contractual indemnity provision in Seckinger's contract with the United States is a direct statement of the warranty of workmanlike performance this court found in *Ryan*. The contractor's responsibility should be greater, not less, where he has expressly acknowledged it; no artificial rule of construction should be allowed to give the contractual language the precise opposite of its natural meaning, thereby exposing the government to the possibility of extensive liability for injuries that may be primarily the fault of government contractors.

II. THE RIGHT OF THE UNITED STATES TO INDEMNITY FOR THE CONSEQUENCES OF THE CONTRACTOR'S NEGLIGENCE IS ESTABLISHED BY THE EXPRESS AND UNEQUIVOCAL LANGUAGE OF THIS CONTRACT

We perceive no equivocation in the standard contractor responsibility clause included in the contract between Seckinger and the United States. It plainly provides that the contractor shall be responsible "for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work * * *." No exception is made for cases in which government negligence also contributes to the damage, and, as we have shown, there are substantial reasons not to read such an exception into the clause.

If the responsibility clause were so narrowly read as not to apply where negligence by the government

also contributes to an accident, the result would be to deprive the clause of any substantial meaning. For the government can seek indemnity under this clause only where it has been subjected to tort liability to a third party, and the government is not subject to tort liability without fault on its part. *Dalehite* v. *United States*, 346 U.S. 15, 44–45; 28 U.S.C. 2671, *et seq.* Despite the contrary suggestion below (App. 21–22), even a settlement or compromise of a claim by the government can be authorized only for injury "caused by the negligent or wrongful act or omission of" a federal employee, 28 U.S.C. 2672; a case could not lawfully be settled to postpone resolution of the question of negligence to an action between the government and its indemnitor, if the responsible government officials believed the government's acts had not wrongfully contributed to the injury complained of.[12] Thus the contractual provision could come into play only in situations where the United States had been adjudicated negligent or had in effect conceded its negligence through compromise or settle-

[12] If there was not strong evidence that the government's negligent acts had contributed to the injury, the indemnitor would be in a position—provided he had not previously assented to the settlement offer—to contest indemnity on the ground that the settlement was not reasonable. *Aetna Freight Lines, Inc.* v. *R. C. Tway Co.*, 352 S.W. 2d 372, 374 (Ky., 1961); *New York Central & H. R.R. Co.* v. *T. Stuart & Son Co.*, 260 Mass. 242, 157 N.E. 540, 543–44 (1927); *Dunn* v. *Ucalde Asphalt Paving Co.*, 175 N.Y. 214, 218, 67 N.E. 439, 440 (1903); *Globe Indemnity Co.* v. *Schmitt*, 142 Ohio St. 595, 53 N.E. 2d 790, 794 (1944); *Tugboat Indian Co.* v. *A/S Ivarans Rederi*, 334 Pa. 15, 5 A. 2d 153, 156 (1939). In practice, if the government believes it has an indemnity claim, it refers any settlement offer to the putative indemnitor.

ment. But the court of appeals ruled that a negligent contractor is not required to indemnify the government where the government is also negligent. Thus, the court's reading of the clause denies it all practical meaning.[13]

There is no policy against indemnification between two negligent parties that would justify invalidation of a contractual indemnity clause or a strained construction that would deprive it of any substantial practical effect. See *Porello* v. *United States*, 153 F. 2d 605, 609 (C.A. 2), remanded, 330 U.S. 446; *National Transit Co.* v. *Davis*, 6 F. 2d 729, 730–733 (C.A. 3); *Eastern Gas and Fuel Associates* v. *Midwest-Raleigh, Inc.*, 374 F. 2d 451, 454 (C.A. 4).

> It is by now well established that indemnification will be ordered in cases where the indemnitee as well as the indemnitor has been negligent, even in the absence of an explicit contractual agreement to that effect, when to hold otherwise would render the contract of indemnity meaningless. [*Unitec Corp.* v. *Beatty Safway Scaffold Co. of Oregon*, 358 F. 2d 470, 479 (C.A. 9), citing cases.] [14]

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[13] There is thus no occasion here to apply the maxim that the contract should be construed against the government as its drafter. "A prerequisite to the application of [the] rule is that the alternative interpretation placed upon the alleged ambiguity by the contractor be, under all the circumstances, a reasonable and practical one." *Gelco Builders & Burjay Const. Corp.* v. *United States*, 369 F. 2d 992, 999–1000 (Ct. Cl.); *Dittmore-Freimuth Corp.* v. *United States*, 390 F. 2d 664, 682, 182 Ct. Cl. 507; *Jefferson Constr. Co.* v. *United States*, 151 Ct. Cl. 75, 84.

[14] An analogous problem is presented in the interpretation of the words "all risks" in exculpatory clauses. The English

III. THE GOVERNMENT IS ENTITLED TO FULL INDEMNITY IF IT PROVES ITS ALLEGATIONS; AT THE MINIMUM IT IS ENTITLED TO INDEMNITY ON A COMPARATIVE BASIS TO THE EXTENT THE CONTRACTOR'S NEGLIGENCE CONTRIBUTED TO THE INJURY

As this Court recognized in *Porello*, 330 U.S. at 458, there are not two but three possible meanings to the contract responsibility clause as applied to the situation in which both parties are negligent. There may be (1) a right to full indemnification, (2) no right to any indemnification, or (3) a right to indemnification on a comparative basis, to the extent the contractor's negligence contributed to a damage award. Since the

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courts have held that an "all risks" clause can have different meanings depending on whether the person relying on the clause is liable as an insurer or only for negligence. In *Rutter* v. *Palmer*, [1922] 2 K.B. 87, 90, the Court of Appeal stated:

> A common carrier is liable for the acts of his servants whether they are negligent or not; an ordinary bailee is not liable for the acts of his servants unless they are negligent. If a common carrier would protect himself from responsibility for all acts of his servants he must use words which will include those acts which are negligent; because words which would suffice to protect him from liability for acts properly done by his servants in the course of their service may fall short of protecting him from their negligent acts. But if an ordinary bailee uses words applicable to the acts of his servants, inasmuch as he is not liable for their acts unless negligent, the words will generally cover negligent acts, although such acts are not specially mentioned, because otherwise the words would have no effect. * * *

Accord: *Halbauer* v. *Brighton Corp.*, [1954] 2 All E.R. 707 (C.A.); *Alderslade* v. *Hendon Laundry, Ltd.*, [1945] 1 K.B. 189.

government cannot be held liable in the absence of fault, however, the second choice (barring recovery completely) would render the clause meaningless, and is unacceptable for the reasons we have given. Therefore, we believe that the choice lies only between full and partial indemnification in this case.

In the government's view, the proper choice would be for full indemnification if it proves the allegations of its complaint, that Seckinger's negligence caused the damages suffered. The common law typically has regarded the problem of allocating loss among co-tortfeasors as an all-or-nothing proposition, denying contribution where the fault is equally divided but granting full indemnity where the fault is disparate. See generally Prosser, *Torts* (3d ed.), pp. 273–81. Even in admiralty cases, where division of damages is traditional, the government has usually obtained full indemnification for damages assessed against it in analogous situations, as it did in *Porello* on remand, 94 F. Supp. 952 (S.D.N.Y.); *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563; *Crumady* v. *The J. H. Fisser*, 358 U.S. 423; *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124. Thus, full indemnification would be in accord with the weight of authority and practice even in the absence of the responsibility clause. In any event, Seckinger's express undertaking to bear *all* damages that might occur as a result of his fault appears to contemplate full indemnity in the circumstances alleged.

The possible alternative would be to allocate damages on a compartive basis. This would certainly be more reasonable than denying indemnification

altogether. By providing for indemnification as to damages caused by the contractor's negligence, the contractual clause does offer some support for the proposition that the loss should be allocated on the basis of fault. Allocation of damages on a comparative basis would be in accord with a growing—if still minority—body of law which views a division of damages as the rational solution in joint-fault situations. Thus, several recent non-maritime cases hold that damages are to be divided on the basis of comparative fault under an indemnity clause similar to the one here involved. *Brogdon* v. *Southern Railway Co.*, 384 F. 2d 220 (C.A. 6); *Williams* v. *Midland Constructors, et al.*, 221 F. Supp. 400, 403 (E.D. Ark.); *C & L Rural Elec. Coop. Corp.* v. *Kincaid*, 221 Ark. 450, 458, 256 S.W.2d 337, on remand, 227 Ark. 321, 299 S.W.2d 67. And a substantial minority of states—most of them by statute—now divide damages among joint tortfeasors by contribution, even where there is no contract between the parties.[15] Prosser, *supra*, p. 275. See also *National Presto Industries* v. *United States*, 338 F. 2d 99 (Ct. Cl.), certiorari denied, 380 U.S. 962 (providing for division of damages resulting

[15] Scholarly discussions of the problem of loss allocation among joint tortfeasors in the absence of contract tend strongly to favor contribution or allocation on a comparative basis. See, *e.g.*, Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 Iowa L. Rev. 517 (1952); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. of Pa. L. Rev. 130 (1932); Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 Cornell L. Q. 552 (1936); Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 So. Cal. L. Rev. 728 (1968); Comment, *Toward a Workable Rule of Contribution in the Federal Courts*, 65 Colum. L. Rev. 123 (1965).

from mutual mistake in a government procurement contract).[16]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the cause remanded to the district court for trial.

Respectfully submitted.

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NOVEMBER 1969.

[16] We do not concede that the application of a comparative negligence approach would deny the United States full indemnity. The government would then endeavor to prove at a trial that the relationship between the parties and the actions of Seckinger make appropriate a 100 percent allocation of fault to Seckinger.

APPENDIX A

Standard Form Contract 23A (Revised March, 1953), in effect at the time of this occurrence [see 44 C.F.R. (1957 Cum. Supp.) 54.11(c), 54.13 Art. 10], is set forth below in its entirety.

STANDARD FORM 23A
MARCH 1953
PRESCRIBED BY GENERAL
SERVICES ADMINISTRATION
GENERAL REGULATION NO. 13

General Provisions

(Construction Contracts)

1. DEFINITIONS

(a) The term "head of the department" as used herein shall mean the head or any assistant head of the executive department or independent establishment involved, and the term "his duly authorized representative" shall mean any person authorized to act for him other than the Contracting Officer.

(b) The term "Contracting Officer" as used herein, shall include his duly appointed successor or his authorized representative.

2. SPECIFICATIONS AND DRAWINGS

The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications

shall govern. In any case of discrepancy either in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without this determination shall be at his own risk and expense. The Contracting Officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

3. CHANGES

The Contracting Office may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however*, That the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Clause 6 hereof. But nothing provided in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise herein provided, no charge for any extra work or material will be allowed.

4. CHANGED CONDITIONS

The Contractor shall promptly, and before such conditions are disturbed, notify the Con-

tracting Officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; provided that the Contracting Officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 hereof.

5. TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS

(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby, and for liquidated damages for delay, as fixed in the specifications or ac-

companying papers, until such reasonable time as may be required for the final completion of the work, or if liquidated damages are not so fixed, any actual damages occasioned by such delay. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor.

(b) If the Government does not terminate the right of the Contractor to proceed, as provided in paragraph (a) hereof, the Contractor shall continue the work, in which event he and his sureties shall be liable to the Government, in the amount set forth in the specifications or accompanying papers, for fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted, or if liquidated damages are not so fixed, any actual damages occasioned by such delay.

(c) The right of the Contractor to proceed shall not be terminated, as provided in paragraph (a) hereof, nor the Contractor charged with liquidated or actual damages, as provided in paragraph (b) hereof because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God or of the public enemy, acts of the Government, in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors or suppliers due to such causes: *Provided,* That the Contractor shall within 10 days from the beginning of any such delay, unless the Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract, notify the Contracting Officer in writing of the causes of

delay. The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal as provided in Clause 6 hereof.

6. DISPUTES

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the head of the department, and the decision of the head of the department or his duly authorized representatives for the hearings of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive: *Provided,* That, if no such appeal to the head of the department is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

7. PAYMENTS TO CONTRACTORS

(a) Unless otherwise provided in the specifications, partial payments will be made as the

work progresses at the end of each calendar month, or as soon thereafter as practicable, or at more frequent intervals as determined by the Contracting Officer, on estimates made and approved by the Contracting Officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by the contract: *Provided, however,* That the Contracting Officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: *And provided further,* That on completion and acceptance of each separate building, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentage thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the Contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the Contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims,

if any, as may be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein. If the Contractor's claim to amounts payable under the contract has been assigned under the Assignment of Claims Act of 1940, as amended (41 U.S.C. 15), a release may also be required of the assignee at the option of the Contracting Officer.

8. MATERIALS AND WORKMANSHIP

Unless otherwise specifically provided for in the specifications, all equipment, materials, and articles incorporated in the work covered by this contract are to be new and of the most suitable grade of their respective kinds for the purpose and all workmanship shall be first class. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the Contracting Officer shall decide the question of equality. The Contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates incorporating in the work, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the Contracting Officer, the Contractor shall furnish the Contracting Officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The Contracting Officer may in writing require the Contractor to remove from the work such employee as the Contracting Officer deems incompetent, careless, insubordinate, or otherwise objectionable, or whose continued employment

on the work is deemed by the Contracting Officer to be contrary to the public interest.

9. INSPECTION

(a) Except as otherwise provided in paragraph (d) hereof all material and workmanship if not otherwise designated by the specifications, shall be subject to inspection, examination, and test by the Contracting Officer at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the Contractor shall promptly segregate and remove the rejected material from the premises. If the Contractor fails to proceed at once with the replacement of rejected material and/or the correction of defective workmanship the Government may, by contract or otherwise, replace such material and/or correct such workmanship and charge the cost thereof to the Contractor, or may terminate the right of the Contractor to proceed as provided in Clause 5 of this contract, the Contractor and surety being liable for any damage to the same extent as provided in said Clause 5 for termination thereunder.

(b) The Contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the Contracting Officer. All inspection and tests by the Government shall be performed in such manner as not unnecessarily to delay the work. Special, full size, and performance tests shall be as described in the specifications. The Contractor shall be charged

with any additional cost of inspection when material and workmanship are not ready at the time inspection is requested by the Contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the Contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective or nonconforming in any material respect, due to fault of the Contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual direct cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the Contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and written or other formal acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site. Nothing contained in this paragraph (d) shall in any way restrict the Government's rights under any warranty or guarantee.

10. SUPERINTENDENCE BY CONTRACTOR

The Contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Contracting Officer, on the work at all times during progress, with authority to act for him.

11. PERMITS AND RESPONSIBILITY FOR WORK, ETC.

The Contractor shall, without additional expense to the Government, obtain all licenses and permits required for the prosecution of the work. He shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work. He shall also be responsible for all materials delivered and work performed until completion and final acceptance, except for any completed unit thereof which theretofore may have been finally accepted.

12. OTHER CONTRACTS

The Government may undertake or award other contracts for additional work, and the Contractor shall fully cooperate with such other contractors and Government employees and carefully fit his own work to such additional work as may be directed by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or by Government employees.

13. PATENT INDEMNITY

Except as otherwise provided, the Contractor agrees to indemnify the Government and its officers, agents and employees against liability, including costs and expenses, for infringement upon any Letters Patent of the United States (except Letters Patent issued upon an application which is now or may hereafter be, for

reasons of national security, ordered by the Government to be kept secret or otherwise withheld from issue) arising out of the performance of this contract or out of the use or disposal by or for the account of the Government of supplies furnished or construction work performed hereunder.

14. ADDITIONAL BOND SECURITY

If any surety upon any bond furnished in connection with this contract becomes unacceptable to the Government, or if any such surety fails to furnish reports as to his financial condition from time to time as requested by the the Government, the Contractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by this contract.

15. COVENANT AGAINST CONTINGENT FEES

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

16. OFFICIALS NOT TO BENEFIT

No member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom: but this provision shall not be construed to extend to this

contract if made with a corporation for its general benefit.

17. BUY AMERICAN ACT

The Contractor agrees that in the performance of the work under this contract the Contractor, subcontractors, material men and suppliers shall use only such unmanufactured articles, materials and supplies (which term "articles, material and supplies" is hereinafter referred to in this clause as "Supplies") as have been mined or produced in the United States, and only such manufactured supplies as have been manufactured in the United States substantially all from supplies mined, produced, or manufactured, as the case may be, in the United States. Pursuant to the Buy American Act (41 U.S.C. 10a–d), the foregoing provisions shall not apply (i) with respect to supplies excepted by the head of the department from the application of that Act, (ii) with respect to supplies for use outside the United States, or (iii) with respect to the supplies to be used in the performance of work under this contract which are of a class or kind determined by the head of the department or his duly authorized representative not to be mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or (iv) with respect to such supplies, from which the supplies to be used in the performance of work under this contract are manufactured, as are of a class or kind determined by the head of the department or his duly authorized representative not to be mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, provided that this exception (iv) shall not permit the use in the performance of work under this contract of supplies manufactured outside the United States if such supplies are

manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

18. CONVICT LABOR

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

19. NONDISCRIMINATION IN EMPLOYMENT

In connection with the performance of work under this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, creed, color, or national origin; and further agrees to insert the foregoing provision in all subcontracts hereunder except subcontracts for standard commercial supplies or for raw materials.

20. DAVIS-BACON ACT (40 U.S.C. 276A-A(7))

(a) All mechanics and laborers employed or working directly upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by the Copeland Act (Anti-Kickback) Regulations (29 CFR, Part 3)) the full amounts due at time of payment, computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics; and a copy of the wage determination decision shall be kept posted by the Contractor at the site of the work in a prominent place where it can be easily seen by the workers.

(b) In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor or any subcontractor

directly on the site of the work covered by this contract has been or is being paid at a rate of wages less than the rate of wages required by paragraph (a) of this clause, the Contracting Officer may (1) by written notice to the Government Prime Contractor terminate his right to proceed with the work, or such part of the work as to which there has been a failure to pay said required wages, and (2) prosecute the work to completion by contract or otherwise, whereupon such Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

(c) Paragraphs (a) and (b) of this clause shall apply to this contract to the extent that it is (1) a prime contract with the Government subject to the Davis-Bacon Act or (2) a subcontract under such prime contract.

21. EIGHT-HOUR LAWS—OVERTIME COMPENSATION

No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this clause. The wages of every laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this clause a penalty of five dollars shall be imposed for each laborer or mechanic for every

calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this clause, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided,* That this stipulation shall be subject in all respects to the exceptions and provisions of the Eight-Hour Laws as set forth in 40 U.S.C. 321, 324, 325, 325a, and 326, which relate to hours of labor and compensation for overtime.

22. APPRENTICES

Apprentices will be permitted to work only under a bona fide apprenticeship program registered with a State Apprenticeship Council which is recognized by the Federal Committee on Apprenticeship, U.S. Department of Labor; or if no such recognized Council exists in a State, under a program registered with the Bureau of Apprenticeship, U.S. Department of Labor.

23. PAYROLL RECORDS AND PAYROLLS

(a) Payroll records will be maintained during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work. Such records will contain the name and address of each such employee, his correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid. The Contractor will make his employment records available for inspection by authorized representatives of the Contracting Officer and the U.S. Department of Labor, and will permit such representatives to interview employees during working hours on the job.

(b) A certified copy of all payrolls will be submitted weekly to the Contracting Officer. The Government Prime Contractor will be re-

sponsible for the submission of certified copies of the payrolls of all subcontractors. The certification will affirm that the payrolls are correct and complete, that the wage rates contained therein are not less than the applicable rates contained in the wage determination decision of the Secretary of Labor attached to this contract, and that the classifications set forth for each laborer or mechanic conform with the work he performed.

24. COPELAND (ANTI-KICKBACK) ACT—NONREBATE OF WAGES

The regulations of the Secretary of Labor applicable to Contractors and subcontractors (29 CFR, Part 3), made pursuant to the Copeland Act, as amended (40 U.S.C. 276c) and to aid in the enforcement of the Anti-Kickback Act (18 U.S.C. 874) are made a part of this contract by reference. The Contractor will comply with these regulations and any amendments or modifications thereof and the Government Prime Contractor will be responsible for the submission of affidavits required of subcontractors thereunder. The foregoing shall apply except as the Secretary of Labor may specifically provide for reasonable limitations, variations, tolerances, and exemptions.

25. WITHHOLDING OF FUNDS TO ASSURE WAGE PAYMENT

There may be withheld from the Contractor so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics employed by the Contractor or any subcontractor the full amount of wages required by this contract. In the event of failure to pay any laborer or mechanic all or part of the wages required by this contract, the Contracting Officer may take such action as may be necessary to cause the suspension, until such violations have ceased, or any further payment,

advance, or guarantee of funds to or for the Government Prime Contractor.

26. SUBCONTRACTS—TERMINATION

The Contractor agrees to insert Clauses 20 through 26 hereof in all subcontracts and further agrees that a breach of any of the requirements of these clauses may be grounds for termination of this contract. The term "Contractor" as used in such clauses in any subcontract shall be deemed to refer to the subcontractor except in the phrase "Government Prime Contractor."

U.S. GOVERNMENT PRINTING OFFICE: 1989

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DEC 30 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 395

UNITED STATES OF AMERICA,

Petitioner,

versus

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY,

Respondent.

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

A more fair statement of the question before this Court would be "Can the Petitioner, the United States, convert a general responsibility clause into one serving to indemnify?"

STATEMENT OF FACTS

The Government's Statement of Facts is generally correct but borrows heavily from non-record matter. There is nothing in our record for example that tells how Branham was burned, or how much electricity was in the exposed government wire. Our record is clear, however, that there was governmental negli-

gence sufficient for a Federal District Court to award Branham $45,000.00 from the United States.

The fact statement goes on and attempts to lodge a transcript of the Branham trial with this court. Whatever transcript lodged was not a part of the record in this case. We cannot pass on its correctness or official nature. Nor have we been served with any transcript to afford the opportunity to review same.

Certainly, if the court chooses to consider this transcript, it should ascertain the official character and consider the entire record.

REASONS FOR AFFIRMING THE FIFTH CIRCUIT COURT OF APPEALS

Petitioner has been adjudged negligent. It now seeks indemnity from Respondent based on contract express and implied.

We should first focus on the pertinent clause.

He (referring to Respondent) shall be "responsible for all damages to persons or property that occurred as a result *of his fault* or negligence in connection with the prosecution of the work." (APP 9) (Parentheses and emphasis supplied)

On this clause the Petitioner bases its entire case.

Respondent, Seckinger, gladly assumes its intended responsibility.

However, we are not responsible for somebody else's negligence, nor do we indemnify the wrongdoer therefor in whole or in part.

Such a strained construction would go far beyond the intention of the parties. Petitioner cannot pass the buck when its own contract did not allow it. It cannot seek more than it paid for. Neither party intended a broad indemnity agreement and did not come close to writing it.

The lower court has a long and valuable history of setting sound and liberal guidelines for interpretation of such clauses.

It has properly considered a real indemnity clause rather rare.

"The first of these, . . . is the rare case in which one of two joint actors enters into a formal indemnity agreement agreeing to hold the other harmless in the event the other party is required to respond in damages for its actions even though such conduct be the result of the other party's own negligence." *General Dynamics Corporation v. Adams*, 340 Fed. 2d 271 (CCA 5, 1965).

It has long given liberal interpretation to such clauses.

See *Standard Oil v. Wampler*, 218 Fed. 2d 768 (CCA 5, 1955).

In that case the court dealt with the following clause in pertinent part:

> "Contractor shall indemnify Standard against damages . . . that may arise from Contractor's operations hereunder . . . and Contractor shall carry . . . public liability and property damage insurance . . .".

The court ruled that the intention of the parties to indemnify need not even be particularly stated in the contract, provided it otherwise clearly appears in the language used.

The Fifth Circuit as early as 1958 stated the majority rule.

See *Batson-Cook Company, Inc. v. Industrial Steel Erectors*, 257 Fed. 410 (CCA 5, 1958).

The court there stated that if one assumed liability for another's negligence, it must be stated in plain and indisputable language.

The indemnity clause there reads in pertinent part as follows:

> "Subcontractor assumes entire responsibility and liability for losses . . . in connection with or arising out of any injury . . . in connection with . . . the performance of the work by the Subcontractor . . . and agrees to indemnify . . . Contractor . . . from any and all such losses . . .".

This language was, of course, much stronger than the language now examined. Petitioner would have had a much better argument under the Batson-Cook language.

Nevertheless, the court there refused recovery by the indemnitee.

The Fifth Circuit spoke again in the year 1962.

See *Jacksonville Terminal Company v. Railway Express Agency, Inc.*, 296 Fed. 2d 256 (CCA 5, 1962) certiorari denied 369 U.S. 860.

The court stated:

> ". . . we are bound to interpret a contract in accordance with the natural and ordinary meaning of the language employed therein."

The court then quoted favorably from *Thomas v. Atlantic Coastline Railway Company*, 201 Fed. 2d 167, 169 (CCA 5, 1953) as follows:

> "We think in view of the surrounding circumstances and of the express provision in the contract that the privilege accorded by the lease shall be enjoyed solely at the risk of appellant, that it was unquestionably the intention of the contracting parties to exempt appellee railroad from liability for ordinary negligence in respect to all claims for fire regardless of origin or however resulting."

The lower court, now under scrutiny, therefore, has set forth these two excellent rules to aid it in the construction of the contracts. What better rules could be found?

Applying these rules to the instant case, they properly affirmed the District Court.

We still have before this Court no real indemnity clause. We have only a puny and weak responsibility clause. The words "fully indemnify" and "save harmless" are completely absent.

The scope of the Jacksonville Terminal indemnifying agreement is also broad.

> ". . . arising by reason of or in connection with the occupation and use of the premises . . ."

Ours says only ". . . as a result of his fault in connection with the prosecution of the work . . .".

Therefore, the Jacksonville Terminal clause was a horse of another color. It was a real indemnity clause.

Our clause could never be called an indemnity agreement.

Moreover, the whole situation, or "the surrounding circumstances" were entirely different in Jacksonville Terminal.

In Jacksonville the indemnifying party was leasing the whole terminal. This certainly was a "dominant role" lease to say the least.

It was entirely different from our situation where Seckinger simply went on government property to help install steam lines.

The lower court spoke properly and liberally again in 1962.

See *Southern Natural Gas Company v. Wilson*, 304 Fed. 2d 253 (CCA 5, 1962).

It again applied the rule seeking "the ascertainment of the intention of the parties."

The indemnity clause there dealt with was in pertinent part as follows:

"14 . . . CONTRACTOR shall be responsible for, and shall indemnify the COMPANY against, any and all claims for damage of any kind due to CONTRACTOR'S negligence."

"25 . . . CONTRACTOR shall indemnify the COMPANY against any and all liability or penalty of any kind that may be asserted against the COMPANY on account of CONTRACTOR'S failure, or alleged failure, to comply therewith."

It should be noted that the clause talks about contractor's responsibility, but then goes further on to talk about "and shall indemnify."

The contract there treated responsibility and indemnification as two separate things, and talked about them separately.

Dealing with the responsibility clause followed by the full indemnity clause, the court naturally required that indemnity be allowed.

But there was a real indemnity clause.

The Court spoke again in 1963.

See *American Agricultural Chemical Co. v. Tampa Armature Works*, 315 Fed. 2d 856 (CCA 5, 1963).

The Court here was faced with two responsibility clauses, Article 8(a) and 8(b), and three indemnity clauses Article 8(c), Article 9, and Article 10.

8(a) stated in pertinent part . . . "The Contractor shall be responsible for all work, materials and equipment covered by this contract and, in case of loss or damage prior to the completion and final acceptance of the work . . . shall repair or replace the same at his own expense."

8(b) stated in part . . . "The Contractor shall be responsible for and make good to the satisfaction of the Owner any loss of or damage to existing structures and property belonging to the Owner if such loss or damage is due to the negligence or wilful acts or omissions of the Contractor . . ."

Having covered responsibility, the contract went on to talk about indemnity, and stated in 8(c) in pertinent part . . . "The Contractor shall indemnify and save the Owner harmless from all claims for damage to property other than the Owner's property arising under or by reason of this Agreement if such claims result from the negligence or wilful acts or omissions of the Contractor, its employees, agents, representatives or subcontractors."

Then Article 9 stated in pertinent part . . . "Contractor shall indemnify and save Owner harmless from all claims for injuries to or death of any and all persons including without limitation . . . arising out of or in connection with or by reason of the work done by Contractor, his employees, agents, representatives or subcontractors."

The contract in Article 10 went even further and stated "The Contractor's responsibility for damage to property and injury to or death of persons as set forth in Articles 8 and 9 includes damage, injury, or death caused in whole or in part by any machinery, tools, or equipment belonging to the Owner and used by the Contractor, or his subcontractors, in the performance of this Agreement, or caused by negligence or wilful acts or omissions of any employee of the Owner while such employee is acting under the direction or control of the Contractor or its subcontractors and in his behalf carrying out for him the work to be performed under this Agreement."

To further solidify the parties' intentions, the insuror in that case went on further and agreed by endorsement that "Contractor shall indemnify and save Owner harmless from all claims for injuries to or death of any and all persons, including without limitation, employees, agents and servants of Contractor or its subcontractors, arising out of or in connection with or by reason of the work done by Contractor, its employees, agents, representatives or subcontractor."

The lower court applied the stated rule of construction, and naturally allowed indemnification.

It relied on the express terms of Article 9 to find the indemnity agreement.

It did not find much indemnification intent in Article 8(a) and 8(b).

In fact, it states that Article 8 in no way limits the broad terms of Article 9 and goes on to say that actually the Number 8 clauses did not cover the subject matter of Article 9.

It should here be made crystal clear that the so-called indemnity clause now before this Court is only slightly broader than the Number 8(a) and 8(b) clauses in the American case.

The court states further "Article 9 is the only provision in the contract having to do with injuries suffered by persons in the category of Powell and Nye. It was a normal provision to place in a contract for the protec-

tion of the owner where employees of another would be carrying on their duties on the property of the owner."

The lower court, applying the rule of clear construction, then decided that the indemnitee was entitled to indemnity. They could do very little else with the full blown indemnity clauses.

Thus, this court is presently examining a jurisdiction, the Fifth Circuit, that has a long, well reasoned and well established record of leaning over backwards to grant indemnity when indemnity is intended. It has never in its judicial history arbitrarily refused indemnity on any theory of law, but stands probably in the forefront of all circuits in granting indemnity in a liberal fashion.

Petitioner's position then becomes clear.

They have tried and are trying to sell this weak, puny, responsibility clause as an indemnity clause.

This, despite the fact that the liberal lower court, carefully selected for the test, has made it very clear that it is not that.

This, despite the fact that it does not even sound like an indemnity clause.

The lower court spoke broadly and liberally again in 1963 on the subject of indemnity.

See *Alamo Lumber Company v. Warren Petroleum Corporation*, 316 Fed. 2d 287 (CCA 5, 1963).

And in 1964.

See *Miller and Company v. L. & N. Railroad Co.*, 328 Fed. 2d 73 (CCA 5, 1964).

Suffice it to say, that in both cases the lower court gave every possible opportunity to a broad and affirmative construction of an indemnity clause. Indemnification was granted because and when the parties clearly had intended it.

Thus, the Fifth Circuit has for many years interpreted indemnity clauses in harmony with the early majority rule.

An overwhelming majority of jurisdictions adhere to the general rule requiring an unequivocal expression of intent before allowing indemnity for the indemnity's own negligence . . .". 41 Am. Jur. 2d, par. 15 at 701.

It should be repeated here that one has to really torture and stretch our clause to call it one of indemnity.

Not once does it even use the word.

It merely states responsibility as to Respondent's negligence.

Is it too much to require a clause to at least use the word it attempts to imitate?

Certainly if this were a real indemnity clause it would at least contain this one word.

Further, the clause doesn't even say to whom the Respondent will be responsible. Is it the public, the injured party, the Petitioner? Is it anyone injured?

It just seems most unfair to try to make a lion out of this lamb.

Remember also that this contract must be construed most strongly against the Government since they wrote it. *Martin v. American Optical,* 184 Fed. 2d 528 (CCA 5, 1950). See Anno. 175 ALR 18, Sec. 8.

And this contract should be construed in its proper perspective:

> "When we zero in on this particular contract from the standpoint of the position of the parties at the time the contract was made, we find no sign pointing unequivocally to a purpose on the part of a small contractor performing some integral part of a government contract to take upon its shoulders the unlimited obligation either in terms of dollars or events precipitating damage to others when caused primarily by the active direct negligence of the government simply because some slight dereliction of the Contractor occurred which, among joint

> tort feasors the law would recognize. The very nature of the National Government argues against any but the largest of industrial enterprises as Governmental contractors, rationally undertaking such far-flung burdens. There is first the very size, the immensity, of Government. This is complicated more frequently as a matter of necessity, by security considerations which close to the private contractor any access to information, sometimes of the most rudimentary kind, by which a contractor could ascertain whether it was reasonably safe to rely upon the expectation that the Government would do its part to minimize risks in today's complex, frequently hazardous, Governmental contract operations."

(See opinion, Fifth Circuit, in this case, APP. 20).

Therefore, it seems clear that the two lower courts gave the clause every possible chance but properly rejected it. This decision of four outstanding jurists should not be lightly overturned.

The Government could have easily been indemnified if it wanted to. All it had to do was write in a complete indemnity clause or a partial one. And not hide the clause under the "Permits" clause. See petitioner's brief p. 36.

Certainly, our body of law must adhere to basic standards that allow citizens to assess risks based on plain language. Such is necessary for our economy.

How else can a man bid on the job intelligently and profitably.

"We should not, in the absence of language free from all doubt, conclude that the parties intended the contractor should assume an obligation which for a single act of negligence on the part of the owner, or one of his employees, over whom the contractor had no restraint or control, would not only wipe out all profit, but would exceed the total consideration for the job." *United States v. Wallace*, 18 Fed. 2d 20 (CCA 9, 1927).

Here Respondent is a small business man. Some say is the backbone of this nation. He works hard, stays up nights and puts in his bid. He bids on the basis of the clear intention of this clause.

Isn't he entitled to protection? How can the Petitioner come before this tribunal and try to make a sleeper out of this clause?

It can only mean exactly what it says.

Petitioner despite its vast and skillful legal apparatus can only get what it paid for.

Why can't the Government, if it desires to be indemnified for its own negligence, write this plainly in the contract? Certainly they have splendid draftsmen available. Certainly they can exclude any risk they desire to exclude, or if they desire partial indemnification, they can state it.

There are countless ways to write a pure indemnity agreement. "Hold harmless," indemnify the United States from any and all losses," "including the second party's own negligence or that of its agents" are just a few of the many. "Indemnify for your part of the injury, and damage" is still another.

An analysis of the cases previously cited show still various other methods.

Whatever the reason might be, the government did not in the contract with Respondent state that Respondent should be responsible wholly or partially for the government's negligence and indemnify it therefor. Having failed to do so, they cannot create the intention in the contract by their unparalleled legal apparatus, and unlimited fiscal resources.

If Petitioner had put a real idemnity clause in initially, the Respondent could have handled the job differently. He would have had to bid higher. He might have provided for additional employees to make sure the Petitioner's negligence was caught before it did any damage.

Countless items could have been done differently if only Respondent had known what Petitioner had in mind and possibly could have afforded the risk which Petitioner now seeks to apply.

Even from another standpoint, we should examine the clause.

The clause states that Respondent shall be responsible for his acts of negligence. What does this mean?

The 6th Circuit states that to be responsible is to be answerable to the discharge of a duty or obligation. Responsibility includes judgment, skill, ability, capacity and integrity, and is implied by power. *Ohio Power Company v. N. L. R. B.*, 176 Fed. 2d 385, 387 (CCA 6, 1949).

A Virginia court states that responsible means legally answerable or accountable for discharge of the duty. *Manassas Park Development Co. v. Offutt*, 203 Va. 382, 124 S.E. 2d 29 (1962).

A Circuit Court has held that the word responsible is far from being broad enough to make the party that has agreed to be responsible actually an insuror against all possible contingencies. It was used to mark the time when the liability should commence. *Fairmont Coal Co. v. Jones & Adams Co.*, 134 Fed. 711, 714 (C.C.A. 7, 1905)

The American College Dictionary states responsible is "answerable or accountable, as for something within one's power, control or management. Involving accountability or responsibility: a responsible position. Chargeable with being the author, cause or occasion of something. Having a capacity for moral decisions and therefore accountable; capable of rational thought or action. Able to discharge obligations or pay debts. Reliable in business or other dealings; showing reliability."

But why must Respondent strain an interpretation of the clause?

The contract must be construed most strongly against Petitioner who wrote the contract. *Martin v. American Optical*, supra.

Construing the agreement most strongly against Petitioner, what was intended by the contract?

Can anyone seriously urge that when Respondent was signing up his plumbing contract and agreed to be "responsible for all damages to persons or property etc." he meant to take care of whatever Petitioner might be held liable for? or a part thereof? or be responsible for the action of the government employees?

"Shall be responsible" is certainly a far cry from "shall indemnify and hold harmless".

How can Petitioner be offering a fair interpretation of the language used?

Still another viewpoint sheds light.

The clause deals with damage to "persons."

Did the Petitioner pay the $45,000.00 to a "person" under the contract?

Was Branham such a person as to be covered by the indemnity clause?

We think not.

Branham was an employee of appellee.

He was dealt with amply and liberally under workmen compensation provisions of the contract. Isn't it a further strained construction to say that this applied to an employee also?

Why would he be dealt with in one section so liberally and again dealt with in another section?

How could the parties have intended this?

To further back off and take a long commonsense look at the government's position, we profit from a genuinely objective view.

The government, in effect, is saying that the United States District Court for the Southern District of South Carolina entered a judgment. No appeal was taken. It now says that the judgment was actually entered against the wrong party since Seckinger, the Respondent was the real culprit.

They say that the real negligent party was the Respondent, yet they stood idly by when the distinguished District Court Judge of South Carolina said they were all wrong. Petitioner naturally had competent defensive trial counsel, who would seize upon the negligence of another as a real impressive defense. Yet the District Court was unconvinced and awarded a judgment against the government alone for $45,000.00.

If Respondent were as negligent as the government now says it is, why did they get stuck for all of it?

The controlling negligence of another is an absolute defense.

How can the government stand idly by when such an injustice is done, let it be done, and then many months later attempt to get the innocent Respondent to share the blame by virtue of a narrow contract and possible implications therefrom.

Isn't the Petitioner actually saying that although they were adjudged negligent, they really were not? Aren't they trying to go behind and change the judgment of the South Carolina District Court?

If we had been so negligent why not use our negligence as a defense? Why not argue that Seckinger was the real party negligent? Remember, Respondent had to be negligent to have breached its alleged agreement with Petitioner, as stated by the lower court". (App. 21)

Certainly the Judge of the District Court in South Carolina would not have awarded $45,000.00 to Branham if a valid escape had been offered.

Under Federal Tort Claim Act, United States of America is liable just like a private person should be. *Arnhold v. U. S.*, 284 Fed. 2d 326 (CCA 9, 1960) Cert. den. 82 Sup. Ct. 122, 368 U. S. 876, 7 L.Ed. 2d 76.

A private person in South Carolina is not liable for someone else's tort.

Tobias v. Carolina Power Co., 190 S. C. 181, 2 S.E. 2d 686 (1939)

Certainly federal law should follow this rule.

Therefore, if we had been so negligent (negligent enough to have breached our contract), the Petitioner would have a wonderful defense to the claim of Branham despite its lack of third party success.

Yet no such defense was apparently offered.

Who ever heard of able government counsel letting a judgment be rendered against the United States when it was actually the tort of an independent contractor.

This is a real knockout punch as a defense.

Thus, for all of the foregoing reasons the Fifth Circuit should be affirmed.

It should be noted that an excellent statement of the background of the law of indemnity can be found in Annotation, 175 ALR on page 12. The article goes into the matter very deeply and thoroughly and particularly at page 144.

Also see Vol. 1, *The Forum*, American Bar Negligence Section pub. p. 1-30 for a 1965 review of the law.

Also a current analysis of the law of indemnity can be found in 42 CJS, Indemnity Sec. 1 et seq., p. 563 et seq. and in 41 Am. Jur., 2d Indemnity, Sec. 13 et seq., p. 697.

All of these authorities likewise would persuade affirmance of the two lower courts.

We should next turn to Petitioner's claim for recovery contained in Count 2. (APP. 5)

Petitioner here seeks recovery upon alleged breach of implied contractual duty.

"12. That having undertaken to perform the contract with the United States of America the defendant, its agents, servants, and employees were obligated to perform the work properly, and safely, and to provide workmanlike service in the performance of said work." (APP. 5)

In so doing it tries to bolster the weak language of the contract by the duty raised by the "Ryan" doctrine. *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 76 Sup. Ct. 232, 100 L.Ed. 133, (1956).

Petitioner wants this court to extend Ryan to a subcontractor plumber who is land based.

Even though it might apply, the accommodating arms of the Ryan doctrine do not aid Petitioner in this case.

In order to reinforce this conclusion, the Ryan doctrine should be briefly examined.

As this Court is well aware, the doctrine was born when it dealt with the obligation of a stevedoring company to the shipowner. The obligation resulted from Ryan agreeing to load cargo on the ship. The general agreement was to take care of the ship's stevedoring needs. The stevedoring was not done properly, and as a result a Ryan employee was injured.

The shipowner under its broad liability had to pay the employee $75,000.00, and attempted to get his money back from Ryan. This Court properly allowed it.

The Court in its decision stressed the uncontroverted agreement to perform all of the shipowner's stevedoring operation. It stated that the agreement necessarily included Ryan's obligation, not only to stow the cargo, but to stow it properly and safely so that the ship would be seaworthy.

Applying this rule to our case, the government could certainly not prevail.

Petitioner does not complain of our improper installation of plumbing. It does not complain that one of our steam pipes broke. It does not complain that one of our valves exploded. It only complains that one of Respondent's employees was injured while performing this work.

It says that this injury was caused by: (APP. 5)

(a) Our failure to request that the power distribution line be energized.

(b) Our failure to request that the wires at the place where the accident occurred should be insulated.

(c) Our failure to provide safety insulation on the wires.

(d) Our permitting and directing the injured employee to work in an area where live wires were in close proximity to his place of work.

(e) Our failure to prevent the injured employee from proceeding in a manner that was dangerous and which caused him to be injured.

It should here be made crystal clear that Respondent was not installing wiring.

We were only doing plumbing work. We were doing an outside steam distribution system at Parris Island (APP. 4)

We were only working near the Petitioner's own wires and electrical system at this Marine Base.

Thus, the government is not complaining that we breached the core of our agreement, or that we did not perform our work properly, but they are going one step farther and saying that in the performance of our agreement we used an employee, and exposed him to Petitioner's negligence, or did not insulate him therefrom.

They not only want us to warrant our work, but Petitioner wants us to insure any injury to our employee because of their negligence.

And this by implication.

It goes without saying that if Petitioner prevails in this appeal, they would prevail in almost any case where an employee of a government contractor was injured on government property e.g. even where our employee was run over by a negligent government truck while the truck was driving to the job. Or even possibly when a negligent marine misdirected a grenade.

Remember also that under the general rules governing judgments, an indemnitee seeking recovery from the idemnitor is bound by all findings without which the judgment could not have been rendered, and if the judgment in the earlier action rested on a fact fatal to recovery in the action over against the indemnitor the latter cannot be successfully maintained. See *Annotation 24 ALR 2d., p. 329; Fidelity Company v. Federal Express,* 136 Fed. 2d 35 (CCA 6, 1943).

Therefore, the Petitioner must start with the admission that they are negligent and caused the injury to our employee. We might add that they are $45,000.00 negligent.

Considering further the Ryan case, this Honorable Court went further in explaining its decision. "This obligation is not a quaisi-contractual obligation implied in law or arising out of a noncontractual relation-

ship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product." *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, supra.

Thus, if the Petitioner were complaining of defective plumbing work, it might well attempt to apply the Ryan doctrine. However, they make no complaint of the quality of our plumbing work, but merely say that we failed to insulate our employee from Petitioner's own negligence.

How far can they expect us to go?

They suggest, to say the least, a rather strained construction of the Ryan doctrine.

The Ryan agreement was a broad contract, and encompasses many things including loading and unloading. It was a contract of seaworthiness. In our case, we only did a little plumbing job on a big government base. In short, our contract was not a broad and all encompassing as a stevedoring contract, but much more narrow and restricted.

The Court continued the Ryan doctrine in the Weyerhauser case and the Crumady case. *Weyerhauser Steamship Co. v. Nacirema Operating Co., 355 U. S. 563, 78 Sup. Ct. 438, 2 L.Ed. 2d 491 (1958); Crumady v. Joachim Fisser, 358 U. S. 423, 79 Sup. Ct., 445, 3 L.Ed. 2d 413 (1959).*

Nothing in these cases would require an extension of the Ryan doctrine to the instant case.

A later Supreme Court expression of the Ryan doctrine appears in *Societa v. Oregon Stevedoring Co., 376 U. S. 315, 84 Sup. Ct. 748, 11 L. Ed. 2d 732 (1964).*

This again was another stevedoring case. The court held: . . . "the stevedore's obligation to perform with reasonable safety extends not only to the stowage and handling of cargo but also to the use of equipment incidental thereto, . . . including defective equipment supplied by the shipowner, . . . and that the shipowner's negligence is not fatal to recovery against the stevedore."

This case contained an excellent dissenting opinion by Mr. Justice Black, who sounds a warning and states in part ". . . the Court here expands the general law of warranty in a way which I fear will cause us regret in future cases in other areas of the law as well as in admiralty. There is no basis in past decisions of this or any other court for the holding that one who undertakes, to do a job for another and is not negligent in any respect nevertheless has an insurer's absolute liability to indemnify for liability to injured workers which the party who hired the job done may incur."

Thus our distinction endures.

We are not dealing with an all encompassing service contract which agreed to furnish all plumbing for the government installation on which the work was done. We are dealing only with a narrow contract to install

a relatively small amount of outside plumbing in accordance with certain plans and specifications.

Certainly, any service contract such as the contract of a stevedoring firm implies many obligations far beyond that of a plumber doing a specified job.

The stevedore takes over the ship and its ingredients of seaworthiness for a time.

The Respondent plumber hardly had command of the Petitioners Parris Island Marine Depot for even a short time.

What if they had tried to take over even the electrical system of Petitioner. Respondent would have probably been thrown in the brig.

This Court in the Ryan case talked about consensual obligation owing to the shipowners. This is a continuation of the warranty of seaworthiness.

What could be more important to a ship to have the cargo continue its seaworthiness? Improper loading will cause improper ballast, and untold risk.

This is why stevedoring is so expensive. You pay the price to have your cargo loaded right so you won't turn over or break up in the middle of the ocean.

However, such a conclusion could not be applied to our situation.

We are performing only a limited and restricted plumbing contract. Petitioner finds nothing wrong with our plumbing. They make no attack on the quality of our work. They try to go five steps further and seek implied indemnity for their own negligence.

The circuit now under scrutiny in 1962 spoke on the subject of implied indemnity and the Ryan doctrine.

See *Halliburton v. Norton Drilling Co.*, 302 Fed. 2d 431 (CCA 5, 1962) 313 Fed. 2d 380, cert. den. 374 U. S. 829, 83 Sup. Ct. 1870, 10 L. Ed. 2d 1052 (1963).

In that case the court dealt with an attempt of one subcontractor to obtain indemnity from another subcontractor. The decision was based on the pleadings only as is our case now before this court.

The court turned to the attempt to collect on implied indemnity and stated: "The initial defect in the appellants' claim based on the theory of implied warranty is that the pleadings are completely devoid of any indication that Norton promised Halliburton that it would remove the cementing head in a careful and workmanlike manner..." "The third party complaint states simply that Norton breached an implied contractual warranty to remove the cementing head in a careful and workmanlike manner. This is a naked conclusion of law, unsupported by the factual allegations of the complaint..."

Thus, if we apply the reasoning of the Halliburton case to our case, the implied warranty theory would have to fall. Our pleadings are also devoid of any

claim that appellant promised appellee that it would perform the plumbing so as to refrain from any of the alleged negligent acts. (APP. 3 et seq)

Nevertheless, this court goes further and attempts to point out the real meaning of the Ryan doctrine. It talks about a much more fundamental reason to refuse indemnification.

The court stated that even if the pleadings had shown a warranty of workmanlike service running from Norton to Halliburton, no indemnification would result.

What do our pleadings show:

"12. That having undertaken to perform the contract with the United States of America the defendant, its agents, servants and employees were obligated to perform the work properly and safely and to provide workmanlike service in the performance of said work." (APP. 5)

Thus, it would seem that Petitioner's theory on implied warranty has already been ruled out with good reason.

The court went further, however. It discussed the real reason for not allowing implied indemnity in the case.

It explained that the claim for indemnity by Halliburton was bottomed on the Ryan doctrine of implied indemnity. The court stated:

"These decisions (Ryan doctrine) represent somewhat of a departure from the general rule that a contract will not be construed to provide for indemnification of the indemnitee for losses due to his own neglect, unless the intention to do so is expressed in unequivocal terms. *27 Am. Jur., Indemnity, Sec. 15; Jacksonville Terminal Company v. Railway Express Agency, Inc.*, supra."

The court then set forth several reasons for the exception afforded in the Ryan doctrine. They are summarized as follows:

1. Ships are subject to the hazards of Maritime service.
2. Ships are usually in a damaged condition when stevedoring is commenced.
3. Other stevedores have exposed the ship to their services throughout the world.
4. The ship might well be a place of danger even as she docks.
5. The stevedoring contractor knows that all of the foregoing conditions are present.
6. The stevedore usually can remedy their defective condition at the expense of the shipowner.
7. The stevedores hold themselves out as being trained and equipped to cope with these conditions and dangers.
8. The stevedore usually has full use and charge of the ship's loading and unloading equipment.

The lower court held that none of these Maritime considerations were present in the Halliburton case which

was a conflict between two subcontractors on an oil drilling operation.

The court clearly stated: "Certainly, a drilling contractor has no reason to expect that equipment furnished by a supplier to the well may be so defective as to be dangerous to life and limb. Consequently, it is highly unreasonable to assume that a drilling contractor, merely by agreeing to perform its services in a careful and workmanlike manner, intends to immunize the supplier of defective equipment from liability for any losses attributable in whole or in part to such defect. Thus, even if Norton did promise Halliburton, either directly or indirectly, that it would remove the cementing head with reasonable care, we would have difficulty construing this as a promise to indemnify Halliburton for losses traceable directly to a defect in the cementing head, for which defect Halliburton alone would be responsible."

Likewise and with stronger reason our situation.

Can we be charged with anticipation that Petitioner has a defective and dangerous electrical system on its Parris Island base?

The Fifth Circuit analyzed Ryan again in 1965.

See *General Dynamics Corporation v. Adams*, supra.

The lower court there stated (referring to the Ryan doctrine):

"Those cases deal principally with the non-delegable duty of a shipowner to maintain a seaworthy vessel, the breach of which makes him liable without proof of negligence. In each of the cases the act of the stevedoring firm against which the Supreme Court permitted the third party action to proceed, constituted the element of unseaworthiness which fastened the vicarious liability of the shipowner."

Thus, from these two excellent decisions of the lower court, it follows that the Ryan doctrine does not apply to our situation.

The lower court, we submit, should be allowed to continue to keep the Ryan doctrine in its present place.

In order to expand the Ryan doctrine Petitioner seizes on an old stevedoring case and attempts to apply it. *American Stevedores v. Porello*, 67 Supreme Ct. 847, 330 U. S. 446, 91 L.Ed. 1011 (1947).

It should be remembered that this was another general stevedoring contract. As such American was responsible for the general seaworthiness of the ship. They did not go on board the ship to fix the plumbing but went on board to take over the general loading of the vessel with the resulting responsibility of unseaworthiness.

Moreover, the specific wording of the contract was much more general and was considered by an Admiralty Court as an admiralty case. There is no admiralty present in the instant case.

Also, Pirello was decided well prior to the Ryan case and should be read in the light thereof. Further, the specific clause itself supposedly one of indemnity was a great deal broader than our clause. Also, the court was faced by lower court determination that both the stevedore and United States were negligent.

We, therefore, feel that Porello is clearly distinguishable and hardly is persuasive to extend Ryan to the instant case.

SUMMARY OF ARGUMENT

Four distinguished jurists have heretofore dismissed petitioner's claim for indemnity. The lower Court has a long history of giving every possible effect to such clauses, but here properly rejected same. The clause did not even use the word "indemnity". Such rule is within the general law of indemnity and cannot be bolstered by the Ryan Doctrine which should be confined to admiralty contracts involving larger scopes of operation.

CONCLUSION

For all of the foregoing reasons we feel that the well-reasoned opinions of the two lower courts should be affirmed. We cannot see any set of facts which if the Petitioner could prove would entitle it to recover under its puny responsibility clause. As stated by the District Court: ". . . the court finds that the language of the contract as alleged is not broad enough either expressly or impliedly to indemnify the Government from its own negligence." Certainly, this excellent decision com-

plimented by affirmance from the Fifth Circuit should not be disturbed.

Respectfully submitted,

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STATE OF GEORGIA)
)
CHATHAM COUNTY)

Service of the foregoing brief has been made as required by depositing sufficient copies thereof properly stamped for Air Mail postage, and properly addressed, to opposing counsel of record,

This ____ day of December, 1969.

Frank S. Cheatham, Jr.
Attorney for
M. O. Seckinger, Jr., t/a
M. O. Seckinger Company
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 395

UNITED STATES OF AMERICA,
Petitioner,

versus

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY,
Respondent.

PETITION FOR REHEARING

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Respondent.

PETITION FOR REHEARING

NOW comes M. O. SECKINGER, and respectfully moves this Honorable Court for a rehearing in the above captioned matter because of the following substantial grounds available to Seckinger and not previously presented in a clear fashion.

I. Porello Reasoning Should Not Be Applied.

Initially, the Porello case, *American Stevedores, Inc., v. Porello,* 330 U. S. 446, (1967) was a case arising in admiralty. Porello was working in the hold of a ship afloat and received all of the benefits of admiralty. This included the inherent and liberal division of responsibility. It was far from a South Carolina land based construction contract.

Next, the clause considered in Porello was born at a time when the United States could be held negligent. This by virtue of the Public Vessels Act.

Thus, an intention to be indemnified could well be present in that contract.

The Porello clause was also a broader clause per se and covered "any service under this schedule." The clause was sixty-two words long versus the twenty-nine words used in the instant clause.

As is usual, the stevedore was in complete control of the ship. He exercised the control far beyond what Seckinger could have exercised at the Marine Base.

Thus, the Porello reasoning developed from an entirely different situation and is not persuasive in this case.

II. The District Court Should Hear Evidence On The Intention Of The Clause.

Even if Porello reasoning is to be followed, a rehearing should be granted on the question of whether evidence could be heard in the District Court on the meaning of the clause.

To state that the intention of the clause is clear would completely ignore the dissent of three distinguished Justices of this Court. They, in short, not only feel that the intention is ambiguous, but they feel that it is entirely different from the intention ascribed to it

by the majority. Nothing could more clearly require examination of intention in the lower court.

Moreover, the Court speaks of "tacit agreement that the background of the clause has been explored as thoroughly as possible."

Seckinger is not aware of such an agreement and should not be foreclosed from relevant testimony. He should have this right as should his opposite contracting parties.

Even if the Court continues to reverse, it should modify and leave this option open to the District Court.

III. The Clause Has Substantial Meaning if Only A Simple Responsibility Clause.

Much weight is given by the majority to the fact that affirmance would drain the clause of any substantial meaning. We would submit that the clause would have great meaning if the Fifth Circuit Court's judgment were left intact.

Since the case was briefed and argued orally, a government contractor, Lockheed Aircraft, has claimed that the government must give it some financial aid. This, because it figured its cost wrong. Lockheed is saying, because of its negligence, the government must be responsible and in some way indemnify it.

Our clause states that "the contractor ... shall be responsible for all damages ... that occur as a result of his fault or negligence ..."

This points up the viability of the clause taken as one of simple responsibility. Its presence probably will protect the taxpayers. Such was its intention.

IV. Only Employee Insulated.

The majority of this Honorable Court also stresses the fact that Seckinger would get out untouched in any and all situations where the government was negligent. This simply does not occur. It might occur to some extent when an employee of Seckinger is injured.

However, if a non-employee were injured, he could file any number of suits against Seckinger, and Seckinger would have to be responsible for damages. This regardless of governmental negligence. Also, in the injured employee situation, Seckinger has paid considerable under the Workmen's Compensation requirements.

V. Clarification of South Carolina Contribution Law Should be Made.

The majority opinion stresses the pertinent South Carolina law is uncertain as to contribution between joint tort feasors.

The dissenting opinion states that contribution does not exist in South Carolina as between joint tort feasors.

Yet the District Court must decide what per cent of the $45,000.00 each alleged joint tort feasor must contribute.

A rehearing should be granted on the question in order to clear up the direction to the lower court, and

establish the South Carolina contribution law. Or, in the alternative, the District Court should be allowed some guide lines in determining the status of pertinent South Carolina law.

VI. Two Hundred Government Claims are Overemphasized.

Seckinger has been continually bludgeoned with the casual statement that 200 government suits are pending on this particular clause. An equivalent counter would be that Seckinger would be out of business if he lost this case. Certainly, if either is so important, a rehearing should be granted. Seckinger could then ascertain the nature of these pending cases and in some way prepare himself to defend against the statement. Moreover, if this is as weighty as it appears, the Court should reconsider the effect of the decision on thousands and thousands of contractors who have gone into agreements with the government containing only a simple responsibility clause.

For the foregoing reasons, the decision of the Court should be reconsidered at rehearing.

Respectfully submitted,

KENNEDY AND SOGNIER

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Savannah, Georgia 31401

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Respondent.

Certification is hereby made that the foregoing is presented in good faith and not for the purpose of delay, and that said petition for rehearing is restricted to the grounds as outlined in Rule 58 of this Court.

This ____ day of March, 1970.

John G. Kennedy

Sworn to and subscribed before
me this ____ day of March, 1970.

Notary Public,
Chatham County, Georgia

STATE OF GEORGIA
CHATHAM COUNTY

CERTIFICATE OF SERVICE

Service of the foregoing Motion for Rehearing has been made as required by depositing sufficient copies thereof properly stamped for air mail postage and properly addressed to opposing counsel of record.

This ____ day of March, 1970.

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SUPREME COURT OF THE UNITED STATES

No. 395.—October Term, 1969

United States, Petitioner, *v.* M. O. Seckinger, Jr., Etc. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 9, 1970]

Mr. Justice Brennan delivered the opinion of the Court.

This case concerns the construction of a provision common to fixed-price government construction contracts which provides that the private contractor "shall be responsible for all damages to persons or property that occur as a result of his fault or negligence . . . ." The Court of Appeals for the Fifth Circuit held that the provision could not be construed to allow the Government to recover from the contractor damages suffered by the Government on account of its own negligence. 408 F. 2d 146 (1969). We granted certiorari because of the large amount of litigation which this contract clause has produced [1] and because of the divergent results which the lower courts have reached in construing the same or similar provisions.[2] 396 U. S. 815 (1969). We reverse.

[1] In the petition for certiorari, the Solicitor General advised that there are presently pending 200 government suits involving the same or similar clauses.

[2] Compare, *e. g., Fisher* v. *United States,* 299 F. Supp. 1 (D. C. E. D. Pa. 1969), and *United States* v. *Accrocco,* 297 F. Supp. 966 (D. C. D. C. 1969), with, *e. g.,* the decision of the Court of Appeals in the instant case.

I

The United States had entered into a contract with the Seckinger Company for the performance of certain plumbing work at a United States Marines base in South Carolina. While working on this project, one of Seckinger's employees was directed by his foreman to assist a fellow employee on a particular section of pipe which had been partially constructed above a street. About four or five feet above the place where the employee was working, there was an electric wire which carried 2,400 volts of electricity. The employee accidentally came into contact with the wire, was thrown to the ground 18 feet below, and was seriously injured.

The injured employee recovered benefits under South Carolina's workmen's compensation law, S. C. Code §§ 72–1—72–504 (1962), and then commenced a suit in the Eastern District of South Carolina against the United States under the Federal Tort Claims Act, 28 U. S. C. §§ 2671–2680, on the theory that his injuries had been sustained as the proximate result of the Government's negligence. The United States, relying on the contract clause, moved to implead Seckinger as a third-party defendant. This motion was denied on the ground that the addition of Seckinger would "unnecessarily and improperly complicate the issues." [3]

On the merits, the South Carolina District Court found that the United States had customarily deenergized its electric wires whenever Seckinger employees were required to work dangerously near them. The court therefore held that the United States had been grossly

[3] The third-party complaint was therefore dismissed "with leave . . . to the United States . . . to take such further action at an appropriate time." The order was not appealed, and we imply no view concerning the propriety of the District Court's action.

negligent in failing to deenergize the wire in this particular case. Alternatively, the Government was held to have been negligent in failing to advise Seckinger's employees that the electric wire had not been deenergized. Concluding also that the employee had in no way contributed to his injury, the district judge ordered that he recover a judgment against the United States in the amount of $45,000 plus costs. No appeal was taken from this judgment of the District Court.[4]

Thereafter, the United States proceeded to the District Court for the Southern District of Georgia and commenced the instant suit against Seckinger. The complaint alleged that Seckinger's negligence was solely responsible for its employee's injuries[5] and that therefore the United States should be fully indemnified for the judgment which it had satisfied. In a second count, the Government alleged that Seckinger, having undertaken to perform its contract with the United States, was obligated "to perform the work properly and safely and to provide workmanlike service in the performance of said work."

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[4] The District Court concluded, *inter alia*, that the negligence of the United States was the "sole cause" of the employee's injuries. We do not pause to consider what effect, if any, under all the circumstances of this case, the South Carolina judgment could properly have in the instant case. The effect of the prior judgment was not raised below except as a defense contention that it constituted an absolute bar to the instant proceedings.

[5] Specifically, the United States alleged that Seckinger was negligent in that it (1) failed to request that the power distribution line be deenergized; (2) failed to request that the wires at the place where the accident occurred be insulated; (3) failed to provide safety insulation on the wires; (4) permitted, and in fact directed, the subsequently injured employee to work in close proximity to the wires; and (5) failed to prevent the employee from proceeding in a manner that was dangerous and which caused him to be injured.

The District Court granted Seckinger's motion to dismiss the complaint on the alternative grounds, first, that the suit was barred by the prior litigation in South Carolina and, second, that the contractual language was not sufficiently broad to permit the Government to recover indemnification for its own negligence. The Court of Appeals rejected the first ground of decision,[6] but sustained the holding that any recovery on the contract was foreclosed to the United States because its negligence had contributed substantially to the injury. The Court of Appeals held that, under the "majority rule," an indemnitee cannot recover for his own negligence in the absence of a contractual provision which unmistakably authorizes this result. Since the contract here did not unequivocally command that the Government be indemnified for its own negligence, and because the injuries in question were thought to have been caused by the "active direct negligence" of the Government with no more than a "slight dereliction" on the part of Seckinger, no recovery whatsoever on the contract would be permitted to the United States.[7]

In the Government's view, this construction of the clause renders it a nullity, for the United States can never be held liable in tort under the Tort Claims Act or otherwise in the absence of negligence on the part of its agents. Thus, so the argument goes, the contractual provision in question can have meaning only

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[6] The Court of Appeals held that the Government's suit was not barred by principles of *res judicata* because the South Carolina District Court expressly left open the option of the United States to pursue its claim against Seckinger at a later time. We agree with this conclusion of the Court of Appeals.

[7] In the present state of the record, we neither accept nor reject this characterization of the relative degrees of fault of Seckinger and the United States.

in a context in which both the United States and the contractor are jointly negligent.[8] In that circumstance, the contractor would be obligated to sustain the full burden of ultimate liability for the injuries produced. Alternatively, the Government suggests that it is entitled to indemnity on a comparative basis to the extent that the negligence of Seckinger contributed to its employee's injuries.

II

In the posture in which this case reaches us, the historical background of the clause[9] and evidence concerning the actual intention of these particular parties with respect to that provision are sparsely presented. We do know that the clause was required in government fixed-price construction contracts as early as 1938.[10] This fact merely precipitates confusion, however, because it was not until the passage of the Tort Claims Act in 1946, Pub. L. 601, ch. 753, §§ 401–424, 60 Stat. 842, as amended, 28 U. S. C. §§ 2671–2680, that the United

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[8] The Government, therefore, does not take issue with those authorities which exhibit reluctance to permit a negligent indemnitee to recover from a faultless indemnitor unless this intention appeared with particular clarity from the contract. See, *e. g.*, *Associated Engineers, Inc.* v. *Job*, 370 F. 2d 633, 651 (C. A. 8th Cir. 1966), cert. denied, 389 U. S. 823 (1967).

[9] In context, the clause in question appears as follows:

"11. PERMITS AND RESPONSIBILITY FOR WORK, ETC.

"The contractor shall, without additional expense to the Government, obtain all licenses and permits required for the prosecution of the work. He shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work. He shall also be responsible for all materials delivered and work performed until completion and final acceptance, except for any completed unit thereof which theretofore may have been finally accepted."

[10] See, *e. g.*, 41 CFR §§ 11.1, 11.3, 12.23, Art. 10 (1938).

States permitted recovery in tort against itself for the negligent acts of its agents. Viewed in the pre-Tort Claims Act context, the purpose of the clause is totally unclear except, perhaps, as an exercise in caution on the part of the government draftsmen, or, conceivably, as an attempt to insulate government agents from liability in their private capacities if their negligence arguably combined with that of the contractor to produce a given injury.

In *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446 (1947), we had before us a contractual provision which was similar to that involved here. There we noted that the clause was susceptible of several different constructions, 330 U. S., at 457–458, and remanded the case to the District Court to ascertain the intention of the parties with respect to the clause. It does not appear that a similar course of action would be fruitful in the instant case. In *Porello* there were clear indications from the parties that further evidentiary proceedings in the District Court would shed light on the actual intentions of the parties.[11] Here, by contrast, there is not only no representation that further proceedings would aid in clarifying the intentions of the parties, but there is at least tacit agreement that the background of the clause has been explored as thoroughly as possible. In these circumstances, we have no alternative but to proceed directly to the contractual construction problem.

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[11] The objective of the remand was frustrated when no additional evidence was presented to the District Court. That court merely adhered to the construction of the contract which had been adopted by the Court of Appeals for the Second Circuit, 153 F. 2d 605 (C. A. 2d Cir. 1946), namely, that the United States was entitled to full indemnity from a stevedoring contractor although both the United States and the contractor were found to have been negligent. *Porello* v. *United States*, 94 F. Supp. 952 (D. C. S. D. N. Y. 1950).

III

Preliminarily, we agree with the Court of Appeals that federal law controls the interpretation of the contract. See *United States* v. *County of Allegheny*, 322 U. S. 174, 183 (1944);[12] *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943). This conclusion results from the fact that the contract was entered into pursuant to authority conferred by federal statute and, ultimately, by the Constitution.[13]

In fashioning a federal rule we are, of course, guided by the general principles which have evolved concerning the interpretation of contractual provisions such as that involved here. Among these principles is the general maxim that a contract should be construed most strongly against the drafter, which in this case was the United States.[14] The Government seeks to circumvent this principle by arguing that it is inapplicable unless there

[12] "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." 322 U. S., at 183.

[13] Congress has provided extensive arrangements for the procurement, management, and disposal of government property. See generally 40 U. S. C. §§ 471–535. As part of this statutory scheme, the Administrator of General Services is authorized to issue regulations necessary to perform his various managerial functions. 40 U. S. C. § 486 (c). Pursuant to this authority, various form contracts, one of which includes the provision that is the subject of this suit, have been promulgated for official use. 41 CFR §§ 1–16.401—1–16.404, 1–16.901–23A, Art. 12 (1969). See generally State Bar of California, Committee on Continuing Education of the Bar, Government Contracts Practice § 13.93 (1964).

[14] See, *e. g.*, *Sternberger* v. *United States*, 401 F. 2d 1012, 1021 (Ct. Cl. 1968); *Sun Shipbuilding & Drydock Co.* v. *United States*, 393 F. 2d 807, 816 (Ct. Cl. 1968); *Jones* v. *United States*, 304 F. Supp. 94, 103 (D. C. S. D. N. Y. 1969).

is ambiguity in the contractual provisions in dispute and there exists an alternative interpretation which is, "under all the circumstances, a reasonable and practical one." *Gelco Builders & Burjay Const. Co.* v. *United States*, 369 F. 2d 992, 999–1000 (Ct. Cl. 1966). The Government itself, however, has proffered two mutually inconsistent interpretations of the contract clause. To be sure, one of them is pressed with considerably more enthusiasm than the other. The Government, nevertheless, must be taken implicitly to have conceded (a) that the clause is not without ambiguity and (b) that there is an alternative construction of the clause which is both "reasonable and practical." Even in the Government's view of the matter, therefore, there is necessarily room for the construction-against-drafter principle to operate.

More specifically, we agree with the Court of Appeals that a contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties. This principle, though variously articulated, is accepted with virtual unanimity among American jurisdictions.[15] The traditional reluctance of courts to cast the burden of negligent actions upon those who were not actually at

[15] A number of courts take the view, frequently in a context in which the indemnitee was solely or principally responsible for the damages, that there can be indemnification for the indemnitee's negligence only if this intention is explicitly stated in the contract. See, *e. g.*, *Freed* v. *Great Atlantic and Pac. Tea Co.*, 401 F. 2d 266 (C. A. 6th Cir. 1968) (intention of parties must be "clear and unambiguous" necessitating a clause such as "including damage from indemnitee's own negligence"); *Brogdon* v. *Southern Ry. Co.*, 384 F. 2d 220 (C. A. 6th Cir. 1967) (same); *City of Beaumont* v. *Graham*, 441 S. W. 2d 829 (Tex. 1969) (indemnitor's promise to indemnify for *his* negligent acts does not extend to indemnification for indemnitee's negligence); *Young* v. *Anaconda American Brass Co.*, 43 Wis. 2d 36, 168 N. W. 2d 112 (1969) (indemnitor not liable

fault [16] is particularly applicable to a situation in which there is a vast disparity in bargaining power and economic resources between the parties, such as exists between the United States and particular government contractors. See *United States* v. *Haskin*, 395 F. 2d 503, 508 (C. A. 10th Cir. 1968).

In short, if the United States expects to shift the ultimate responsibility for its negligence to its various contractors, the mutual intention of the parties to this effect should appear with clarity from the face of the contract. We can hardly say that this intention is manifested by the formulation incorporated into the present contract.[17] By its terms Seckinger is clearly liable for *its*

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for such portion of total liability attributable to act of indemnitee unless indemnity contract by express provision and strict construction so provides); cases collected in Annot., 175 A. L. R. 8, 29–38 (1948).

Other cases do not require that indemnification for the indemnitee's negligence be specifically or expressly stated in the contract if this intention otherwise appears with clarity. See, *e. g.*, *Auto Owners Mut. Ins. Co.* v. *Northern Ind. Pub. Serv. Co.*, 414 F. 2d 192 (C. A. 7th Cir. 1969); *Eastern Gas and Fuel Associates* v. *Midwest-Raleigh, Inc.*, 374 F. 2d 451 (C. A. 4th Cir. 1967); *Unitec Corp.* v. *Beatty Safeway Scaffold Co.*, 358 F. 2d 470 (C. A. 9th Cir. 1966); *Batson-Cook Co.* v. *Industrial Steel Erectors*, 257 F. 2d 410 (C. A. 5th Cir. 1958).

[16] Several earlier cases declared clauses which purported to indemnify for the indemnitee's negligence void as contrary to public policy. See, *e. g.*, *Sternaman* v. *Metropolitan Life Ins. Co.*, 170 N. Y. 13, 62 N. E. 763 (1902); *Johnson's Administratrix* v. *Richmond & D. R. Co.*, 86 Va. 975, 11 S. E. 829 (1890). See also *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85 (1955); *Otis Elevator Co.* v. *Maryland Cas. Co.*, 95 Colo. 99, 33 P. 2d 974 (1934).

[17] An example of an indemnification clause which makes specific reference to the effect of the negligence of the indemnitee is the following recommendation of the American Institute of Architects:

"4.18. INDEMNIFICATION

"4.18.1. The Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses including attorneys'

negligence, but the contractual language cannot readily be stretched to encompass the Government's negligence as well.[18]

On the other hand, we must not fail to accord appropriate consideration to Seckinger's clear liability under

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fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (b) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder." AIA Document A 201, Sept. 1967.

We specifically decline to hold that a clause which is intended to encompass indemnification for the indemnitee's negligence must include an "indemnify and hold harmless" clause or that it must explicitly state that indemnification extends to injuries occasioned by the indemnitee's negligence. Thus, contrary to the view apparently adopted in the dissenting opinion, we assign no talismanic significance to the absence of a "hold harmless" clause. Our approach is, in this respect, consistent with *American Stevedores* v. *Porello*, *supra*, 330 U. S., at 457–458. Contract interpretation is largely an individualized process, with the conclusion in a particular case turning on the particular language used against the background of other indicia of the parties' intention. Consequently, we hold only that, in this case, the clause which provides that Seckinger will be responsible for all damages resulting from its negligence is sufficiently broad to encompass responsibility for injuries resulting from the negligence of the Government. And, of course, the Government is entitled to no recovery unless it establishes that Seckinger was negligent. Thus the dissenting opinion mischaracterizes the scope of our holding when it states that Seckinger must "reimburse the Government for losses *it* incurs resulting from *its* negligence."

[18] See, *e. g.*, *United States* v. *Haskin*, 395 F. 2d 503 (C. A. 10th Cir. 1968); *Brogdon* v. *Southern Ry. Co.*, 384 F. 2d 220 (C. A. 6th Cir. 1967); *Shamrock Towing Co.* v. *City of New York*, 16 F. 2d 199 (C. A. 2d Cir. 1926); *Williams* v. *Midland Constructors*, 221 F. Supp. 400 (D. C. E. D. Ark. 1963); *City of Beaumont* v. *Graham*, 441 S. W. 2d 829 (Tex. 1969); *Young* v. *Anaconda American Brass Co.*, 43 Wis. 2d 36, 168 N. W. 2d 112 (1969).

the contract for "*all* damages" which resulted from its "fault or negligence." (Emphasis added.) The view adopted by the Court of Appeals, and now urged by Seckinger, would drain this clause of any significant meaning or protection for the Government, and, indeed, would tend to insulate Seckinger from potential liability in any circumstance in which any negligence is also attributable to the United States. Whatever may have been the actual intention of the parties with respect to the meaning of the clause, it is extremely difficult to believe that they sought to utilize this contractual provision to reduce Seckinger's potential liability under common law or statutory rules of contribution or indemnity.[19] Yet, that is arguably the result if the clause is

[19] Employer liability for injuries suffered by his employees to which his negligence partially contributed varies from jurisdiction to jurisdiction. In the absence of workmen's compensation statutes, the employer and the third-party tortfeasor would be jointly and severally liable, under traditional principles, for the injuries produced. In a majority of jurisdictions, contribution or indemnity is available either by statute or common law, as a device for the redistribution of the burden among the joint tortfeasors. See generally W. Prosser, Law of Torts, §§ 47, 48 (3d ed. 1964). In 1956, when Seckinger's employee was injured, South Carolina law was unclear in this respect, apparently permitting contribution or indemnity under some circumstances. See generally Comment, Indemnity Among Joint Tort-Feasors, 17 S. C. L. Rev. 423 (1965).

Workmen's compensation provisions, now enacted in all States, have considerable effect on the employer's potential liability to the third-party tortfeasor. However, these statutes vary greatly in the categories of employers and employees to which they apply, see generally, A. Reede, Adequacy of Workmen's Compensation (1947), and even today about two-thirds of the statutes provide that coverage is voluntary as to both employers and employees. A. Larson, Workmen's Compensation Law § 67.10 (1969).

When a workmen's compensation plan does cover particular employers and employees, a third-party suit against an employer who was also negligent is barred by the majority rule, although recovery is not infrequently permitted on implied or quasi-contractual theories. See, *e. g., Associated Engineers, Inc.* v. *Job,* 370

interpreted to mean that Seckinger's liability is limited to situations in which it, as opposed to the United States, is the sole negligent party.

Furthermore, in this latter situation, it is perfectly clear that, both before and after the passage of the Tort Claims Act, the United States could not, in any event, be charged with liability in the absence of negligence on its part. In short, the construction of the clause adopted by the Court of Appeals tends to narrow Seckinger's potential liability and, also, limits its application to circumstances in which no doubt concerning Seckinger's sole liability existed. In the process, considerable violence is done to the plain language of the contract that Seckinger be responsible for *all* damages resulting from *its* negligence.

A synthesis of all of the foregoing considerations leads to the conclusion that the most reasonable construction of the clause is the alternative suggestion of the Government, that is, that liability be premised on the basis of comparative negligence.[20] In the first place, this interpretation is consistent with the plain language of the clause, for Seckinger will be required to indemnify the United States to the full extent that its negligence, if any, contributed to the injuries to the employee.

F. 2d 633, 651 (C. A. 8th Cir. 1966); A. Larson, *supra*, §§ 76.00–76.53. Whether such a suit is permitted under South Carolina law apparently has not been authoritatively determined. See generally *Burns* v. *Carolina Power & Light Co.*, 88 F. Supp. 769 (D. C. E. D. S. C. 1950).

[20] A number of courts have reached comparable results. See, *e. g.*, *Brogdon* v. *Southern Ry. Co.*, 384 F. 2d 220 (C. A. 6th Cir. 1967); *Williams* v. *Midland Constructors*, 221 F. Supp. 400 (D. C. E. D. Ark. 1963); *C & L Rural Elec. Coop. Corp.* v. *Kincaid*, 221 Ark. 450, 256 S. W. 2d 337 (1953), on remand, 227 Ark. 321, 299 S. W. 2d 67 (1957); *Young* v. *Anaconda American Brass Co.*, 43 Wis. 2d 36, 168 N. W. 2d 112 (1969). See also, *United States* v. *Haskin*, 395 F. 2d 503 (C. A. 10th Cir. 1968); *Shamrock Towing Co* v. *City of New York*, 16 F. 2d 199 (C. A. 2d Cir. 1926).

Secondly, the principle that indemnification for the indemnitee's own negligence must be clearly and unequivocally indicated as the intention of the parties is preserved intact. In no event will Seckinger be required to indemnify the United States to the extent that the injuries were attributable to the negligence, if any, of the United States. In short, Seckinger will be responsible for the damages caused by its negligence; similarly, responsibility will fall upon the United States to the extent that it was negligent.

Finally, our interpretation adheres to the principle that, as between two reasonable and practical constructions of an ambiguous contractual provision, such as the two proffered by the Government, the provision should be construed less favorably to that party which selected the contractual language. This principle is appropriately accorded considerable emphasis in this case because of the Government's vast economic resources and stronger bargaining position in contract negotiations.[21]

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[21] While it is true that the interpretation adopted by the Court of Appeals is even less favorable to the Government than that which we adopt, we have concluded, for reasons previously stated, that the Court of Appeals' view would drain the clause of any significant meaning and is decidedly contrary to its plain language.

A 1941 letter from the Comptroller General, 21 Comp. Gen. 149 (1941), relied upon in dissent, sheds no light whatever on the problem of contract construction before us. There the Comptroller General, in commenting upon a question which he said was "of first impression" suggested that, under some circumstances, a contractor under a *cost-plus-fixed-fee* contract may seek reimbursement from the Government, as an element of his actual costs, for damages which he sustained by reason of his negligence. Since the contract clause in question was introduced long before the 1941 letter, it obviously was not responsive to any issues raised by the Comptroller. Moreover, we deal in this case with a *fixed-price* construction contract, a type of contract with which the Comptroller General was in no way concerned. Thus, no support is provided for the facile assumption of the dissent that, merely because a *cost-plus* contractor may arguably seek reimbursement for additional costs produced

For these reasons, we reverse the judgment of the Court of Appeals and remand this case to the District Court for further proceedings consistent with this opinion.[22]

Reversed and remanded.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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by his own negligence, it follows that a contractor committed to complete a project for a *fixed price* also may seek reimbursement because of damage caused by his own negligent acts.

We agree with the dissenting opinion that the contract clause does mean exactly what it says. What it says is that Seckinger shall be "responsible for all damages" arising from its negligence, that is, that the burden of Seckinger's negligence may not be shifted to the United States. To be sure, the clause bars any attempt by Seckinger to obtain reimbursement from the Government for Seckinger's negligence. But an interpretation which limited the operation of the clause to this narrow situation would constitute an impermissible frustration of the contractual scheme, for such a construction would shift the burden of Seckinger's negligence to the United States through the medium of a recovery against the Government by the injured employee. The contractual objective—that liability for the contractor's negligence not be shifted to the United States—can be achieved in cases of concurrent negligence when there has been a prior recovery against the Government only by resort to the comparative negligence analysis that we have adopted, which requires Seckinger to indemnify the Government, but only to the extent that the Government was called upon, in the first instance, to respond in damages as a result of Seckinger's negligence.

[22] Because we have taken the view that the rights and liabilities of Seckinger and the United States *inter se* are governed by contract, we need not reach the Government's alternative theory, rejected by the Court of Appeals, that Seckinger breached an implied warranty of workmanlike service.

SUPREME COURT OF THE UNITED STATES

No. 395.—October Term, 1969

United States, Petitioner, v. M. O. Seckinger, Jr., Etc. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 9, 1970]

Mr. Justice Stewart, with whom The Chief Justice and Mr. Justice Douglas join, dissenting.

The standard form that the Government uses for its fixed-price construction contracts has long contained a single sentence saying that the contractor "shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work."[1] For more than 30 years it has evidently been understood that these words mean what they rather clearly say—that the contractor cannot hold the Government for losses he incurs resulting from his own negligence.[2] The provision, in short, is what the Court of Appeals called "a simple responsibility clause." 408 F. 2d, at 148.[3] But today this innocuous

[1] This sentence is contained in a paragraph entitled "Permits and Responsibility for Work, etc." See *ante*, p. —, n. 9.

[2] I have found no previous reported decision construing this clause as the Court construes it today.

[3] It will not do to say, as the Court says today, that this construction of the clause makes its purpose "totally unclear" or "would drain this clause of any significant meaning or protection for the Government . . . ." For without such a clause, there would surely be room for the contractor to claim reimbursement from the Government for unforeseen increased costs incurred on account of his negligence, particularly where the Government was jointly negligent. With respect to contracts *not* containing such a clause—cost-plus

boilerplate language is turned inside out. For the Court says that the provision really is a promise by the contractor to reimburse the Government for losses *it* incurs resulting from *its* negligence.

To be sure, the Court does not go quite so far as to hold that this obscure clause operates as a complete liability insurance policy. But the Court does hold that the clause requires the contractor to indemnify the Government "to the full extent that its negligence, if any, contributed to the injuries to the employee." The magnitude of the burden the Court imposes is well illustrated by the circumstances of this case. Here an employee of the contractor was injured in the scope of his employment on plumbing work that the contractor was performing at the Paris Island Marine Depot in South Carolina. The employee recovered from the contractor the benefits to which he was entitled under the state workmen's compensation law. The employee then sued the Government under the Federal Tort Claims Act, claiming that his injuries had actually been caused by the Government's negligence. The Federal District Court agreed, finding that the negligence of the United States was the "sole cause" of the employee's injuries and awarding him $45,000 in damages. The Court today says that the United States can now recover an indeterminate portion of this $45,000 from the contractor, because the contractor has *agreed* to "indemnify the United States . . . ."

Despite intimations in the Court's opinion to the contrary, we do not deal here with "common law or statu-

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contracts, for example—the Comptroller General advised the Secretary of War almost 30 years ago that the Government may, indeed, be liable to the contractor under such circumstances. See 21 Comp. Gen. 149, 156–157 (1941).

tory rules of contribution or indemnity."[4] The only question the Court decides is the meaning of the words of a clause in a government contract.[5] I think the meaning attributed to that clause today is as unconscionable as it is inaccurate.

The clause first appeared in government contracts at least eight years before the enactment of the Federal Tort Claims Act in 1946. Before the passage of that Act the United States could not be sued in tort for personal injuries. Thus there was absolutely no reason for the Government to secure for itself a right to recovery over against an alleged joint tortfeasor. Yet we are asked to believe that the drafter of this clause was so prescient as to foresee the day of government tort liability nearly a decade in the future, and so ingenious as to smuggle a provision into a standard contract form that would, when that day arrived, allow the Government to shift its liability onto the backs of its contractors. This theory is nothing short of incredible.

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[4] Under the law of South Carolina—which determines the Government's liability in tort to the injured employee, 28 U. S. C. § 1346 (b); *Richards* v. *United States*, 369 U. S. 1—the general rule is that there is no right to contribution among joint tortfeasors. *Atlantic Coast Line R. Co.* v. *Whetstone*, 243 S. C. 61, 68–70, 132 S. E. 2d 172, 175–176. Moreover, since the injured employee has accepted his award against Seckinger under the State workmen's compensation statute, he cannot hold Seckinger in tort. S. C. Code §§ 72–121, 72–123 (1962); *Adams* v. *Davison-Paxon Co.*, 230 S. C. 532, 545, 96 S. E. 2d 566, 572–573. So Seckinger can hardly be cast in the role of a tortfeasor in any event.

[5] The Court's conclusion that the Court of Appeals' construction of the clause might "reduce Seckinger's potential liability under common law or statutory rules of contribution or indemnity" seems wholly incorrect. The contractor's agreement not to seek reimbursement or contribution from the Government would have no bearing upon the question whether local "common law or statutory rules of contribution and indemnity" give the Government any right to recover from the contractor.

In drafting its construction contracts the United States certainly has both the power and the resources to write contracts providing expressly that it will pass off onto its contractors, either in whole or in part, liability it incurs for damages caused by its own judicially determined negligence. The Government could require its contractors to hold it harmless without regard to fault on their part, or it could establish a proration of liability arising from the joint negligence of the parties. But the contractual provision before us does neither. It no more says that the contractor shall reimburse the Government for his share of joint negligence than that he he shall be a liability insurer for the Government's sole negligence.

The Court nonetheless manages to discover that the clause amounts to a contribution agreement, relying for its conclusion upon cases involving not the simple responsibility clause before us, but express indemnification agreements with "hold harmless" clauses.[6] This result is said to be desirable because it ensures a fair distribution of loss between those jointly responsible for the damage. But when Seckinger entered into this contract, he had every reason to expect that his liability for injuries to his employees would be limited to what is imposed by the South Carolina compensation law. That law relieved him of responsibility in tort in exchange for his guaranty that his employees would recover without regard to fault. Presumably his bid on the government project reflected his reasonable expectation that this would be the extent of his liability on account of employee accidents. Now the Court heaps an unforeseen federal contractual burden atop the requirement the State has already imposed.[7]

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[6] These cases are cited in the Court's opinion, *ante*, p. —, n. 20.

[7] Under South Carolina law Seckinger has been subrogated to his injured employee's claim against the United States to the extent of

If the Government wants to impose additional liabilities upon those with whom it contracts to do its work, I would require it to do so openly, so that every bidder may clearly know the extent of his potential liability. Even in the domain of private contract law, the author of a standard form agreement is required to state its terms with clarity and candor.[8] Surely no less is required of the United States of America when it does business with its citizens.[9]

Mr. Justice Holmes once said that "[m]en must turn square corners when they deal with the Government." [10] I had always supposed this was a two-way street. The Government knows how to write an indemnification or contribution clause when that is what it wants. It has not written one here.

I would affirm the judgment.

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his own compensation payment. S. C. Code § 72–124 (1962). But the Court today subjects Seckinger to the incremental risk of liability in contribution, in a yet-to-be-determined proportion, for the employee's added recovery in his tort suit against the Government.

[8] *E. g., Chrysler Corp.* v. *Hanover Ins. Co.*, 350 F. 2d 652, 655; *Riess* v. *Murchison*, 329 F. 2d 635, 642; Restatement of Contracts § 235 (e); 3 A. Corbin on Contracts § 559 (1960).

[9] *Sternberger* v. *United States*, 401 F. 2d 1012, 1021; *Jones* v. *United States*, 304 F. Supp. 94, 101.

[10] *Rock Island, A. & L. R. Co.* v. *United States*, 254 U. S. 141, 143.